

JUSTICE FOR AMERICA: USING MILITARY COMMISSIONS TO TRY THE 9/11 CONSPIRATORS

HEARING BEFORE THE SUBCOMMITTEE ON CRIME, TERRORISM, AND HOMELAND SECURITY OF THE COMMITTEE ON THE JUDICIARY HOUSE OF REPRESENTATIVES ONE HUNDRED TWELFTH CONGRESS FIRST SESSION

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CONTENTS

APRIL 5, 2011

	Page
OPENING STATEMENTS	
The Honorable F. James Sensenbrenner, Jr., a Representative in Congress from the State of Wisconsin, and Chairman, Subcommittee on Crime, Terrorism, and Homeland Security	1
The Honorable Robert C. "Bobby" Scott, a Representative in Congress from the State of Virginia, and Ranking Member, Subcommittee on Crime, Terrorism, and Homeland Security	3
The Honorable Lamar Smith, a Representative in Congress from the State of Texas, and Chairman, Committee on the Judiciary	4
The Honorable John Conyers, Jr., a Representative in Congress from the State of Michigan, and Ranking Member, Committee on the Judiciary	5
WITNESSES	
David Beamer, father of United 93 Passenger Todd Beamer	
Oral Testimony	7
Prepared Statement	10
Charles D. Stimson, Senior Legal Fellow, The Heritage Foundation	
Oral Testimony	16
Prepared Statement	17
Stephanie Hessler, Fellow, Manhattan Institute for Policy Research	
Oral Testimony	27
Prepared Statement	28
Stephen A. Saltzburg, Professor of Law, George Washington University	
Oral Testimony	32
Prepared Statement	33
LETTERS, STATEMENTS, ETC., SUBMITTED FOR THE HEARING	
Material submitted by the Honorable Louie Gohmert, a Representative in Congress from the State of Texas, and Ranking Member, Subcommittee on Crime, Terrorism, and Homeland Security	52
APPENDIX	
MATERIAL SUBMITTED FOR THE HEARING RECORD	
Prepared Statement of the Honorable Robert C. "Bobby" Scott, a Representative in Congress from the State of Virginia, and Ranking Member, Subcommittee on Crime, Terrorism, and Homeland Security	85
Prepared Statement of the Honorable Sheila Jackson Lee, a Representative in Congress from the State of Texas, and Member, Subcommittee on Crime, Terrorism, and Homeland Security	88
Prepared Statement of the Honorable John Conyers, Jr., a Representative in Congress from the State of Michigan, and Ranking Member, Committee on the Judiciary	93
Prepared Statement of the Honorable Henry C. "Hank" Johnson, Jr., a Representative in Congress from the State of Georgia, and Member, Subcommittee on Crime, Terrorism, and Homeland Security	98
Department of Justice Fact Sheet	100

IV

	Page
Document from Human Rights First	103
Letter dated November 25, 2009, from Carolyn B. Lamm, President, the American Bar Association (ABA), to the Honorable Eric H. Holder, Jr., Attorney General of the United States	108
Letter from military leaders to the President	112
Letter from John C. Coughenour, United States District Judge, Western District of Washington	115
Letters from 9/11 Families for a Safe and Strong America, received from family members, first responders, survivors, friends, and co-workers of the fallen	129

OFFICIAL HEARING RECORD

MATERIAL SUBMITTED FOR THE HEARING RECORD BUT NOT REPRINTED

Human Rights First report entitled: In Pursuit of Justice, Prosecuting Terrorism Cases in the Federal Courts, May 2008; submitted by the Honorable John Conyers, Jr., a Representative in Congress from the State of Michigan, and Ranking Member, Committee on the Judiciary. This report is available at the Subcommittee and can also be accessed at:

<http://www.humanrightsfirst.org/wp-content/uploads/pdf/080521-USLS-pursuit-justice.pdf>

Human Rights First report entitled: In Pursuit of Justice, Prosecuting Terrorism Cases in the Federal Courts, 2009 Update and Recent Developments, July 2009; submitted by the Honorable John Conyers, Jr., a Representative in Congress from the State of Michigan, and Ranking Member, Committee on the Judiciary. This report is available at the Subcommittee and can also be accessed at:

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JUSTICE FOR AMERICA: USING MILITARY COMMISSIONS TO TRY THE 9/11 CONSPIRATORS

TUESDAY, APRIL 5, 2011

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON CRIME, TERRORISM,
AND HOMELAND SECURITY,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommittee met, pursuant to call, at 10:01 a.m., in room 2141, Rayburn Office Building, the Honorable F. James Sensenbrenner, Jr. (Chairman of the Subcommittee) presiding.

Present: Representatives Sensenbrenner, Smith, Gohmert, Goodlatte, Lungren, Poe, Marino, Gowdy, Adams, Scott, Conyers, Johnson, Pierluisi, Chu, and Quigley.

Staff present: (Majority) Caroline Lynch, Subcommittee Chief Counsel; Sam Ramer, Counsel; Sarah Allen, Counsel; Anthony Angeli, Counsel; Lindsay Hamilton, Clerk; (Minority) ; Joe Graupensberger, Counsel; Sam Sokol, Counsel; and Veronica Eligan, Professional Staff Member.

Mr. SENSENBRENNER. The Subcommittee will come to order.

Today's hearing examines the role of military commissions in granting justice to the families of the September 11 attacks.

Yesterday, the Obama administration announced it will try the 9/11 conspirators, including Khalid Sheikh Mohammed, in military commissions rather than in a U.S. civilian court.

I find it a strange coincidence that the Administration decided to announce this 180 degree turn in policy the day before this hearing and on the very same day that the President announced his reelection campaign. I and many others believe that the security of the United States should not depend upon politics. The President's 2009 executive order to vacate military commissions was a decision based on political ideology and not the safety of America or the will of its people.

I also find it ironic that Attorney General Holder cites the delay in trying KSM and his co-conspirators as his reason for today's decision, given that it was the decision of this Administration that brought justice for America to all. In his statement, General Holder laid the blame for the delay in the 9/11 trials at Congress' feet, saying that he was forced to proceed with military commissions because of our decision to prohibit the use of Federal funds for civilian trials of these and other Gitmo detainees. As they say in New

York City, it takes real chutzpa to say something like that. In terms of the criticism that General Holder had of the Congress, Congress did the right thing. The Administration was off on the wrong track, and I can say that we can chalk one up for Congress on a bipartisan basis on this issue.

Congress was merely doing what the President failed to do over the last 2 years, which is to respond to the demands of the American people who overwhelmingly opposed bringing KSM and cohorts to the United States for trial. But since he is handing us credit for bringing KSM to justice, we will take it with one caveat: we must acknowledge the efforts of the 9/11 victims' families in particular. It was their dogged determination and endless advocacy, I believe, that brought this Administration to the path of reason and common sense.

It should have not have taken over 2 years to make this decision. The victims of the families should not have had to wait until the President announced his reelection campaign for the Administration to recognize what most Americans know in their hearts, that KSM and other co-conspirators are enemy combatants and that the atrocities of September 11 were not just domestic crimes like robbery or burglary. They were acts of unmitigated war against the entire country, and as such, all of the United States and its people were victims in some way of this attack.

I hope that the delays caused by the Administration's flip-flopping will not sabotage the success of the military commissions. And since we are all here, we have an excellent opportunity to examine the good sense of proceeding with military tribunals and find out whether these political delays have harmed the chance of achieving justice.

On September 11, 2001, nearly 3,000 men, women, and children were slaughtered in one of the most heinous assaults in our Nation's history. The country mobilized for war, and in 2003, 9/11 mastermind KSM was captured in Pakistan. KSM became a valuable asset in our war against al Qaeda, providing operational details about that organization on every level, even to the point of explaining how al Qaeda goes about recruiting more terrorists. Once every bit of operational intelligence was obtained from KSM, the military began its legal proceedings to hold him accountable for the terrorist act he designed.

KSM has never been shy about his act of war against the United States. In March 2007, KSM testified in a closed-door hearing in Guantanamo. According to transcripts of the hearing released by the Pentagon, he said I was responsible for the 9/11 operation from A to Z.

He and four other 9/11 conspirators were charged in a military commission trial in 2008. They were assigned lawyers for their defense under the Code of Military Justice, and in December 2008, KSM and his co-conspirators offered to plead guilty for their roles in the September 11 atrocities.

But on January 21st, 2009, Khalid Sheikh Mohammed received a stay. On his first day in office, President Obama, by executive order, halted the trial against KSM and the others and ordered the Guantanamo Bay facility closed.

In November of the same year, Attorney General Eric Holder announced that he would house KSM in Manhattan and try him in a Federal courthouse 2 blocks from Ground Zero, granting him every constitutional right afforded U.S. citizens.

Today we will examine the use of military commissions to try KSM and the other 9/11 conspirators. Those al Qaeda soldiers must be tried in military commissions for the simple fact that what they did on that fateful day 10 years ago was not a crime. It was an act of war.

I would like to extend a special welcome to Mr. David Beamer, father of Todd Beamer, the brave father of three who saved countless people when he fought back against the Flight 93 hijackers, uttering the words, "let's roll," before taking action. The families of the 9/11 victims have waited patiently for justice for their loved ones. Ten years is long enough. It is time for justice now.

It is now my pleasure to recognize for his opening statement the Ranking Member of the Subcommittee, the gentleman from Virginia, Mr. Scott.

Mr. SCOTT. Thank you, Mr. Chairman, and I welcome this hearing on an important issue as we discuss some of the fundamental principles underlying how we attempt to achieve justice in this country.

Yesterday the Administration announced that it would refer cases and the accused 9/11 plotters to military commissions. I view this announcement not has a choice between viable alternatives but merely reverting to the last possible option against those who are accused of attacking our people.

The Attorney General had announced at the end of 2009 that the 9/11 plotters would be tried in Federal court and that he was extremely confident in the strength of these cases. Since that time, Congress has imposed restrictions, making it impossible for the Guantanamo Bay detainees to be brought to the United States for those trials in Federal court.

Yesterday's announcement is a reflection of the fact that Congress left no practical option open to the Administration, and I believe the actions of Congress in this regard were unwise. Our Federal criminal justice system with its laws and procedures is time-tested and provides the best chance for obtaining verdicts against guilty defendants which we will have confidence will withstand scrutiny against court challenges. The Federal courts have convicted 400 people in terrorism-related charges over the last 10 years. In contrast, there have been only six convictions under the commissions since 9/11, and during that time, we have learned that the survivability of the commissions under court challenges cannot be taken for granted. In fact, Federal courts have a stronger record of securing convictions and imposing tough punishments than military commissions do.

A report by the Center for American Progress found that criminal courts are a tougher and more reliable forum for prosecuting terrorists than military commissions. In fact, terrorists prosecuted by commissions had received shockingly short sentences and some have already been released as of the date of the report a year ago. We should have the confidence in the ability of Federal courts to continue doing their job in such cases.

This situation reminds me of the counterproductive juvenile justice policy we have pursued in this country over the past 2 decades. We have studied the idea of trying more juveniles as adults, and we have found that in the adult system those studies have revealed that the sentences are shorter for those juveniles and that the recidivism rate is higher. However, politicians insist on campaigning down that path. It does more harm than good just because it sounds tough.

Prosecuting terrorists in front of military commissions likewise sounds tougher than civilian courts, and as we have seen with prior successful challenges to military commissions, we cannot know whether the commissions and perhaps the convictions obtained under them will survive court challenges until those challenges have been brought and considered all the way to the Supreme Court.

Ultimately by trying terrorists in Federal courts, we protect our citizens and the principles of the Constitution which is our ultimate defense against threats to our Nation and our freedom. When Judge Bill Young sentenced the shoe bomber, Richard Reid, in Federal court, he said, see that flag, Mr. Reid? That is the flag of the United States of America. That flag will fly long after all of this is forgotten. That flag stands for freedom. You know it always will. Custody, Mr. Officer. Stand him down.

I thank the witnesses for testifying today. It is another hallmark of our democracy that we will hear and consider different points of view, learn from each other, and we are all the better for it. So I look forward to hearing their testimony and thank you, Mr. Chairman, for calling the hearing.

Mr. SENSENBRENNER. Thank you, Mr. Scott.

The Chair recognizes the Chairman of the full Committee, the gentleman from Texas, Mr. Smith.

Mr. SMITH. Thank you, Mr. Chairman.

It has been nearly 10 years since the attacks on September 11. Yet, Khalid Sheikh Mohammed, otherwise known as KSM, and his four co-conspirators still have not been brought to justice for an act of war that took the lives of nearly 3,000 innocent people.

It is unfortunate that it took the Obama administration more than 2 years to figure out what the majority of Americans already know, that KSM is not a common criminal. He is a war criminal.

After KSM was captured, many of us believed that once he was thoroughly interrogated, he would be brought to justice. The prior Administration tried to do just that by bringing him before a military tribunal. Unfortunately, President Obama brought that process to a halt as one of his first acts as President.

Now, on the first day of his reelection campaign, the President has reversed himself yet again and ordered the 9/11 conspirators to be tried in military commissions.

Last year, Congress restricted the use of Federal funds to try any Gitmo detainee in the U.S. courts, and two-thirds of the American people support military commission trials for the 9/11 terrorists. Trying foreign terrorists in civilian courts makes it harder for prosecutors to obtain a conviction. We saw this recently with the civilian trial against Gitmo detainee, Ahmed Ghailani, the first foreign terrorist detained at Guantanamo Bay to be tried in civilian courts.

This trial was the test run for the Obama administration's plan to try foreign terrorists in U.S. courts. It was also a near disaster. Ghailani was acquitted of all but one of the 285 counts against him.

Despite yesterday's announcement, I am concerned that there are some at the Justice Department who will not give up their fight for undeserved terrorist rights. Simply because the Administration has finally decided to do the right thing with KSM doesn't mean that all foreign terrorists will be tried in military commissions. The Administration needs to develop a clear and consistent policy that treats all foreign terrorists as enemy combatants.

Ten years is too long to wait for justice. But after nearly a decade, I hope that this trial will provide some satisfaction to the families of the victims of 9/11.

Thank you, Mr. Chairman. I yield back.

Mr. SENSENBRENNER. The Chair now recognizes the Chairman emeritus junior grade and Ranking Member, the gentleman from Michigan, Mr. Conyers.

Mr. CONYERS. Thank you, Chairman Sensenbrenner and Members.

This is an important hearing, and I am glad that the witnesses chosen are here today. I thank you very much for coming.

Now, it just seems to me that there are those here who support the proposition that military commissions are better for trying people accused of war crimes because there is more likelihood of a conviction. Now, for Members of the Judiciary Committee to take that position is one that I respectfully cannot agree with. I think there should be some other test, and perhaps we will get that from our witnesses today.

When I look at the lists of people my staff has evaluated and talked about, the people that I think quite a bit of have come out in support of the regular Federal trials. After all, no one has been convicted yet, and it is amazing how the presumption of innocence doesn't apply in some cases but it applies in others. And that is what we are here to talk about.

But I want to thank first the Constitution Project, the Human Rights First organization. And I am going to put in the record the statements and hope that I will have an opportunity for further discussions with Members of the Judiciary Committee.

Mr. SENSENBRENNER. Without objection, the statements will be placed in the record.*

Mr. CONYERS. Thank you, sir. But these statements will come from Supreme Court Justice Anthony Kennedy; the former Secretary of State, Colin Powell; the former Director of the Federal Bureau of Investigation, Bill Sessions; the former Rear Admiral John Huston; Brigadier General James Cullen; the American Correctional Association; and a letter from the American Bar Association in support of prosecuting alleged terrorists and terrorists in our Federal court system and particularly Judge John C.

*The material referred to is not reprinted in this hearing record but is available at the Subcommittee and can be accessed at <http://www.humanrightsfirst.org/wp-content/uploads/pdf/080521-USLS-pursuit-justice.pdf> and <http://www.humanrightsfirst.org/wp-content/uploads/pdf/090723-LS-in-pursuit-justice-09-update.pdf>

Coughenour of the Western District of Washington who has handled as many of these cases as any member of the judiciary.

In the case of Ahmed Ressam, the so-called Millennium Bomber, it involved 3 months of trials. He went up to the Ninth Circuit three times, to the Supreme Court once. And he says that this definitively concludes in his experience that these trials in a Federal court are not injurious or should not be rejected.

Now, this does not mean that there are no circumstances under which military commissions—

Mr. SENSENBRENNER. The gentleman's time has expired.

Mr. Conyers [continuing]. Cannot be approved.

And I thank the gentleman.

Mr. SENSENBRENNER. Without objection, all Members' opening statements will be placed in the record at this point.

It is now my pleasure to introduce today's witnesses. David Beamer is the father of the late Todd Beamer, one of the passengers on United Flight 93 which was downed in Shanksville, Pennsylvania during the terrorist attacks on September 11, 2001. Todd Beamer was a resident of Cranbury, New Jersey where he worked as an account manager for Oracle Corporation. He was traveling to California for a business meeting when the 9/11 conspirators hijacked United Flight 93. Along with other passengers, Todd disrupted the terrorist plot and diverted the plane from its intended target of Washington, D.C. Todd and 39 others were killed in the plane crash.

Since 9/11, David Beamer has been a tireless advocate for 9/11 families and policy issues relating to national security and terrorism.

Charles "Cully" Stimson is a leading expert on criminal law, military law, military commissions and detention policy at The Heritage Foundation's Center for Legal and Judicial Studies. Before joining Heritage, Stimson served as the Deputy Assistant Defense Secretary for Detainee Affairs where he advised the Secretary of Defense on detainee issues worldwide, including at Guantanamo Bay, Iraq, and Afghanistan where he coordinated the Department's detention policy and operations with his senior counterparts at the National Security Council, the Justice and State Departments, the military services, and the intelligence community.

He chaired the Defense Senior Leadership Oversight Committee which was responsible for tracking and executing all 492 recommendations from the 12 major investigations into the Defense Department's detention policy and practices in the aftermath of the Abu Ghraib prison scandal.

He led three high level European delegations on official trips to Guantanamo and also traveled to Guantanamo dozens of times to escort Members of the House, Senate, media, policymakers, academics, and other influential thinkers.

He spent 13 years as a criminal prosecutor, defense attorney, and law professor. He is a decorated military veteran and continues to serve as a judge advocate for general reservists in the Navy where he sits as a military judge. In his three active duty tours in the Navy, Stimson served as a military prosecutor, defense attorney, and deployed to East Africa in 2000 for Operation Nat-

ural Fire as the force judge advocate and deployed with Navy SEALs in the joint special operations JAG in 2001.

He received his law degree from the George Mason University School of Law.

Stephanie Hessler is an adjunct fellow at the Manhattan Institute where she writes frequently on constitutional law, national security law, counterterrorism law, and judicial nominations. Previously she served as a constitutional lawyer for the Senate Judiciary Committee and drafted legislation and advised on a wide variety of topics, including terrorist surveillance, domestic wiretapping, Guantanamo detainees, and habeas corpus. Ms. Hessler clerked for Chief Judge Boyce F. Martin, Jr. at the United States Court of Appeals for the Sixth Circuit. She received her B.A. in English literature from Kenyon College and her J.D. from the New York University School of Law.

Professor Stephen Saltzburg joined the George Washington University School of Law in 1990. Before that, he taught at the University of Virginia School of Law. Prior to teaching, he held numerous governmental positions, including Associate Independent Counsel in the Iran-Contra investigation, Deputy Assistant Attorney General in the Criminal Division of the U.S. Department of Justice, the Attorney General's ex officio representative on the U.S. Sentencing Commission, among others. In 2002, he was appointed to the ABA President's Advisory Group on Citizen Detention and Enemy Combatant Issues, and he chaired the ABA Criminal Justice Section from 2007 to 2008. He received his B.A. from Dickinson College and his J.D. from the University of Pennsylvania.

Without objection, the witnesses' statements will appear in the record in their entirety.

Each witness will be recognized for 5 minutes to summarize their written statement. We have a three-colored light in front of each of you. The yellow light means you have got a minute left. The red light means the time is up, folks.

So I will first recognize for 5 minutes Mr. Beamer. Thank you very much for coming here.

**TESTIMONY OF DAVID BEAMER, FATHER OF UNITED 93
PASSENGER TODD BEAMER**

Mr. BEAMER. Chairman Sensenbrenner, Members of the Committee, I appreciate this hearing that is taking place and I am thankful for the opportunity to speak today.

Unfortunately, the remarks I originally prepared to present, after yesterday's surprise announcement by the Attorney General, no longer seem adequate. I had planned to come here today to press our case for justice for our beloved families and friends and all those whose lives were cut short on that horrible day simply now known as 9/11. My appeal was to be a humble one. How, I planned to ask, after all we witnessed and experienced, individually and as a Nation, on that terrible, dark day can we satisfied to let justice founder?

Americans answered the call that day—fire fighters, police, first responders—without hesitation, some of them knowing that they weren't going to probably make it out alive, led on by a sense of duty just to try and save someone else's life. Passengers and crews

on airplanes all took action that day, and many people from all over America came to Ground Zero to work to try and remove the bodies of those who they refused to let lie beneath 1.8 million tons of toxic rubble. Some of those brave people are even now dying because of their actions on those days.

How, I planned to ask, can we who survived that day forsake their courage, their dignity, their decency by letting justice fail? How can it be that KSM, 10 years after that fateful day, 4 years after he confessed and proudly acknowledged his role, his major role, in making it happen, proudly proclaiming that he had the hand that killed journalist Daniel Pearl—how can we still be sitting here with him not brought to justice?

We, the families, many not even having the opportunity for a grief-soothing help in a simple burial for something called “justice”—yesterday we were told by the highest law enforcement officer in the land, Attorney General Eric Holder, that justice is finally on the way.

So why was the Attorney General’s speech such a bitter disappointment to me and so many family members? Why after the last 2 years of anguish and uncertainty did the Attorney General’s speech feel like yet another heavy burden instead of welcome relief?

The victims will get their justice, but let us be clear, according to the Attorney General, not the best justice. The best venue for prosecution was in Federal court, Mr. Holder scolded. He said I stand by that decision today, he said defiantly. Indeed, the Attorney General spent the entirety of his speech telling us that he was delivering justice to these poor families but of an inferior sort, not the powerful, well researched and documented case which not only would have proven the guilt of the accused, but would have allowed us to adhere to the bedrock traditions and values of our laws.

Of course, the implication was clear. Military commissions are none of this. Worse, the unwise and unwarranted interference of Congress in limiting the President’s ability to bring terrorists to U.S. soil has actually created the potential for harm to national security. How he does not say. We are simply left to ponder the serious ramifications of congressional trespass which is so dangerous the Obama administration will continue to seek to reverse the irresponsible actions of the people’s representatives, lest they attempt to deliver second-class justice to other Guantanamo detainees.

Today, however, we are stuck with military commissions, and here at last is the bitterest pill that Mr. Holder coldly serves up. We have to miss this opportunity for the sort of grand justice only the Federal courts are capable of delivering because the families of the victims demand it.

The families who had waited 7 long years when President Obama ground these cases to a halt were made to wait 2 more years by the Administration’s incoherent process. Let us be clear. The families were already tired of waiting when the Obama team arrived on the scene. Alleged concern for the plight of the families is Mr. Holder’s most contemptible conceit.

Let us be crystal clear. The families had no say, no voice, no champions inside the Holder Justice Department. We were ignored, tolerated, overlooked, and misled. When it was apparent that we

did not support civilian trials for the war criminals who slaughtered our families as 200,000 troops risked their lives to fight the same enemy on the same battlefield, we were summarily dismissed from the process. We were not a cooperative bunch. Here is why. The process was preordained from day 1 and those of us who were paying attention know it.

Mr. Holder told you yesterday he approached this case with an open mind, that his only goal was to look at the facts and the law and choose the venue where swift and certain justice could move and most effectively be achieved. What could be more swift and more certain than the defendant's declaration 1 month before Mr. Obama took office that they wish to plead guilty to the charges and be executed? The families of the victims, some of whom were sitting in that courtroom when he made this proffer, were elated. At long last, we could begin the end of our terrible agonizing journey.

President Obama prevented this from going forward. It was a campaign promise the President made and the Attorney General, then a private citizen campaigning for his candidate, told supporters Mr. Obama would fulfill it as one of his first presidential acts. Indeed, on the second day in office, the newly elected President signed sweeping executive orders which did away with all the work that Congress had accomplished in promulgating a legal framework for military commissions. And it nullified 3 years of case preparation by the Office of Military Commissions when they were just months away from the conclusion of the case. These campaign promises were made. They were delivered. The signals by this Administration are clear.

The 10th anniversary of 9/11 rapidly approaches. The national 9/11 memorial at the World Trade Center will be opening. The Flight 93 memorial at Shanksville, Pennsylvania will be opening. The eyes of the world will once again be focused on Ground Zero. What is the world going to say? What will the world think where America has not demonstrated the political will or the moral courage to have already brought confessed perpetrators of this act to justice? It is shameful. It is disappointing. It hurts.

[The prepared statement of Mr. Beamer follows:]

Prepared Statement of David Beamer

Chairman Sensenbrenner and Members of the House of Representatives Committee on the Judiciary:

I appreciate that this hearing is taking place and am thankful for the opportunity to speak today.

Unfortunately, the remarks I originally prepared to present, after yesterday's surprise announcement by the Attorney General, no longer seem adequate. I had planned to come here today to press our case for justice--for our beloved families, friends and co-workers, all the magnificent people whose loves were cut short so suddenly in the horrific and savage attacks that will forever be known, simply, as, "9/11."

My appeal was to be a humble one. How, I planned to ask, after all we witnessed and experienced, individually and as a nation, on that terrible, dark day, can we be satisfied to let justice founder?

Americans answered the call. Firefighters, police, and other first responders answered without hesitation, some knowing they would not survive, but rushing in, urged on by the duty and hope of saving just one life. At the Pentagon, those who survived rededicated themselves to avenging their lost comrades and protecting the country. The passengers and crews on airplanes all took courageous action, their lives changing in the blink of an eye. We saw people from all over America work for months in a recovery effort. Some of them are now dying because they would not leave their fellow human beings beneath 1.8 million tons of toxic rubble.

How, I planned to ask, can we, who survived that day, forsake their courage, their dignity, their decency, by letting justice fail?

How can it be that Khalid Sheikh Mohammad, aka, KSM, has not been brought to justice? ...10 YEARS AFTER 2,976 human beings were torn to pieces, four years after KSM bragged about his central role in their destruction and in the unspeakable murder of journalist Daniel Pearl?

We, the families--mothers and fathers, husbands and wives, sons, daughters, sisters, brothers and friends--waited patiently, many without even the grief-softening help of a simple burial, for something called "justice." Yesterday we were told by the highest law enforcement officer in the land, Attorney General Eric Holder, that justice is finally on the way.

So, why was the attorney general's speech such a bitter disappointment? Why, after the last two years of anguish and uncertainty, did the attorney general's speech feel like yet another heavy burden instead of welcomed relief?

While the media treated the announcement as another opportunity to keep score--was this or was this not a humiliating capitulation for the president and his law man, Mr. Holder--most reporters seemed not to notice the fundamental dishonesty of his actual words and message.

Yes, the victims will get their justice, but let us be clear, not the best justice. "The best venue for prosecution was in federal court," Mr. Holder scolded. "I stand by that decision today," he said defiantly. Indeed, the attorney general spent the entirety of his speech telling us that he was delivering justice to these poor families, but of an inferior sort, not the "powerful," "well-researched and documented" case which, not only would have proven the guilt of the accused, but would have allowed us to "adher[e] to the bedrock traditions and values of our laws."

Of course, the implication was clear. Military commissions are none of this. Worse, the "unwise," "unwarranted" interference of Congress in limiting the president's ability to bring terrorists to onto U.S. soil has actually created the potential for harm to national security. How, he doesn't say. We are simply left to ponder the "serious ramifications" of Congressional trespass, which is so dangerous, the Obama administration will continue seek to reverse the irresponsible actions of the people's representatives lest they attempt to deliver second-class justice in *other* Guantanamo cases.

Today, however, we are stuck with military commissions, and here, at last, is the bitterest pill Mr. Holder coldly serves: we have to miss this opportunity for the sort of grand justice only the federal courts are capable of delivering...because the families demand it.

The families, who had waited seven long years when President Obama ground these cases to a halt, were made to wait two more years by the administration's incoherent process. Let us be clear: The families were *already* tired of waiting when the Obama team arrived on the scene. Alleged concern for the plight of the families is Mr. Holder's most contemptible conceit. Let us be crystal clear. The families had no say, no voice, no champions inside the Holder Justice Department. We were ignored, tolerated, overlooked and misled. When it was apparent that we did not support civilian trials for the war criminals who slaughtered our families, as 200,000 troops risk their lives to fight this same enemy on this same battlefield, we were summarily dismissed from the process. We were not a cooperative bunch. Here's why: the process was pre-ordained from day one, and those of us who were paying attention knew it.

Mr. Holder told you yesterday that he approached this case with an open mind, that his only goal was to look at the facts and the law and choose the venue where "swift and certain justice" could most effectively be achieved. What could be more swift and more certain than the defendants' declaration, one month before Mr. Obama took office, that they wished to plead guilty to the charges and be executed? The families of the victims, some of whom were sitting in that courtroom when he made his proffer, were elated. At long last, we could begin the end of our terrible, agonizing journey.

President Obama prevented this from going forward. It was a campaign promise that the president made, and the attorney general--then a private citizen campaigning for his candidate--told supporters Mr. Obama would fulfill as one of his first presidential acts. Indeed, on his second day in office, the newly-

elected president signed sweeping executive orders which did away with all the work that Congress had accomplished in promulgating a legal framework for military commissions. And it nullified three years of case preparation by the Office of Military commissions when they were just months away from the conclusion of the case.

These campaign promises were made, and these executive orders were issued, without an examination of the evidence in these cases or in consultation with the lawyers most familiar it, namely, the attorneys drawn from both the Department of Defense and the Department of Justice who had toiled away for three years in preparation for trial. Neither candidate Obama, or President-elect Obama or newly-minted President Obama had seen one shred of evidence on these cases when he terminated them with the stroke of a pen. This was a raw exercise of executive authority without regard for the history we had all, as a nation, lived through, and without consultation with or regard for the people whose beloved family members had been so brutally taken from them on that catastrophic day.

The attorney general finished his press conference yesterday, leaving one final insult to the commissions and the dedicated prosecutors and staff at the Office of Military Commissions. He lamented the fact that federal courts don't get the proper respect they are due, and made a final pitch for them, as if they, and not commissions, have been the object of years of unrelenting assault, by him, by his boss in the Oval office, and by the legions of lawyers, law professors, human rights activists, and anti-military propagandists whose appeal to moral vanity has found fertile ground in this Justice Department.

Mr. Holder's words are a clear signal to these parties, that they have a friend in the White House and at the Justice Department, and their legal assaults on military commissions should continue apace after after the 10th anniversary of 9/11 is safely behind us.

For thousands of Americans the wounds of 9/11 will never heal. The policies of this administration cause us all to grieve anew.

Instead of swift justice, President Obama worries that a military tribunal will offend the Muslim world. What about the effect of this needless delay on the morale of the American people. America has captured the mastermind who attacked and killed us in our homeland and here we and he sit. We have been through enough! We are tired of waiting for these admitted killers to get justice. We are tired of more pain added to the wounds of 9/11. When last month we heard that President Obama will reinstitute Military Commissions, we were encouraged momentarily, only to learn that this administration will not try the 9/11 cases. We are denied even the courtesy of an explanation ... It hurts.

Mr. Chairman, the American people do not want terrorists brought to American soil.

They do not want the "mastermind" of 9/11, who is held under the laws of war, to be afforded the same rights as robbers and car thieves. While tens of thousands of our troops fight on, the enemy they fight is protected with Miranda rights and an army of lawyers. We do not want the individuals who carried out 9/11 to have any more legal advantage than justice requires. We do not want them to continue their jihad, mocking their victims, the justice system and this country, from the well of a federal court and the attendant media circus. We do not want hundreds of millions of dollars in security costs spent, cities put under lock down, or commerce disrupted.

The 10th anniversary of 9/11 will soon be upon us. The National September 11 Memorial at the World Trade Center and the Flight 93 Memorial in Shanksville will be opening. The eyes of the world will once again be focused on ground zero.

If the trials of the men who bragged about murdering our sons and daughters have not commenced, a dark cloud will hover over

that day. This must not be. The world must not see an America that lacks political will and moral courage at the place where heroes died.

Nearly 10 years ago, men and women showed courage in so many ways. They made us proud. They sacrificed. The 40 people on Flight 93 in less than one hour, their last hour of life, did the right thing. We know the result ... victory. The Capitol was spared, and in the aftermath, Congress too acted decisively. We owe it to the wonderful people we lost that day, to finally hold their murderers accountable. Mr. President, this delay is anguish. Please end it, and allow these trials to proceed immediately and without the added controversy of the attorney general's constant disaffection from what the families and the American people have made plain that they want, and this Congress has found a way to give them.

On what was to be the last morning of their lives, under horrific circumstances, so many acted with such courage and dignity and decency.

Mr. President, we ask that you do not forsake them.

Chairman Sensenbrenner and members of the committee, thank you for listening.

Mr. SENSENBRENNER. Thank you, Mr. Beamer. [Applause.]
The Chair will remind members of the audience and Members of the Committee that it is against the rules of the House of Representatives and thus the Committee to make expressions of either support or opposition to any statements that are made by wit-

nesses or by Members of the Committee and will ask that future expressions be taken out into the hallway.

Mr. Stimson, you are recognized for 5 minutes.

**TESTIMONY OF CHARLES D. STIMSON, SENIOR LEGAL
FELLOW, THE HERITAGE FOUNDATION**

Mr. STIMSON. Mr. Chairman, Ranking Member Scott, and Members of the Committee, I want to thank each of you for holding this hearing today and for inviting me to testify. Thank you.

This hearing could not be more timely. Yesterday's announcement vindicates this Subcommittee's work and probably would not have happened without the real leadership exercised by Members of the Subcommittee. But this hearing is appropriately looking forward, not backwards.

Over the years, a strong bipartisan consensus on the use of military commissions has emerged and has become the dominant position in Washington. Even President Obama, once a critic of trials by military commission, has acknowledged that they are—and I quote—an appropriate venue for trying detainees for violations of the laws of war. Unquote. And that they protect our vital national security interests and that they provide appropriate safeguards and procedural rights for those tried. I agree with the President on those points and welcome his Administration's announcement yesterday.

But I remain concerned that this Administration is not fully supportive or even invested in commissions. So my message today is simple. Now that the right decision has been made, stand by it and provide commissions the appropriate resources.

I have three points.

First, certain cases will require the use of military commissions rather than civilian courts.

Second, military commissions provide robust procedural protections to defendants.

And third, the Administration and this Congress should fully resource commissions to ensure their success.

And let me take each in order.

The first is that for practical reasons, certain cases face hurdles to try in civil courts and will need to be brought before military commissions. In Federal court, criminal defendants receive the full panoply of procedural and substantive rights guaranteed by the Constitution, but those guarantees were never intended to extend to enemy belligerents, and indeed, they would render effective prosecution in many cases just impossible. U.S. soldiers on battlefields, whether in the war on terror or a more conventional armed conflict, do not mirandize enemy fighters, do not apply to magistrate judges for search and arrest warrants, and do not offer captured enemy fighters the customary opportunity to call an attorney. The Constitution does not, of course, require that soldiers do any of these things, nor does it require that we extend to captured belligerents the same procedural protections that apply to criminal defendants. Those requirements, however, would apply in a Federal courtroom and could derail the prosecution.

Consider, for example, the right to a speedy trial, which is guaranteed to criminal defendants by the Sixth Amendment. If the Ad-

ministration tried KSM in Federal court at this late date, there is a substantial risk that it would not have been able to provide a legal justification for the years of delay in bringing him to trial. Lack of political courage in making a forum selection is not a cognizable legal excuse. As a result, all charges would have been dismissed. That is fine in a regular run-of-the-mill criminal case, but in war the stakes are much higher.

Or consider the bar on most hearsay evidence as required by the Sixth Amendment's Confrontation Clause. In a Federal court, the rule against hearsay could keep out reams of military intelligence and other reliable evidence in a terrorist prosecution, evidence that was gathered not with an eye toward law enforcement, but for the purpose of national defense. In a military commission, unlike in Federal court, hearsay is admissible as long as the side offering the statement can show that it is reliable.

Another practical consideration is incentives. The rules of war codified in the Geneva Conventions create a set of incentives for belligerents. Follow the rules and if you are captured, you will be accorded the benefit of those rules. But by trying unprivileged enemy belligerents in Federal court instead of military commissions, we reward the violation of those rules and give those belligerents greater protections than a typical lawful prisoner of war would receive. That is dangerous policy.

My second point. Military commissions provide robust procedural protections to detainees, and I have included a chart in my testimony, Mr. Chairman and Ranking Member Scott, where you can look at that.

And my third point is this. Now that KSM will finally be tried before a military commission, the Administration and Congress must take every reasonable step to ensure that the trial is an exemplar of justice and the rule of law. This will take resources. Chief among them are the attorneys who will prosecute and defend the case. We need the very best our country has to offer. The Department of Justice should detail its top terrorism prosecutors to these cases. Although exceptionally talented, hard-working, and intelligent, many of the JAG's who are currently detailed to commissions simply do not have the requisite trial experience to handle a case of this complexity and weight on their own. The solution is collaboration. Federal prosecutors, once detailed as lead prosecutors to the commissions, must work with JAG prosecutors. Similarly for the defense, the Administration should ensure that learned counsel, military and Federal defenders are detailed to these cases.

Thank you very much, Mr. Chairman.

[The prepared statement of Mr. Stimson follows:]

Prepared Statement of Charles D. Stimson

I would like to thank Chairman Sensenbrenner, Ranking Member Scott, and members of the Subcommittee for inviting me to testify today on the use of military commissions to try appropriate war crimes, including the 9/11 conspiracy.

My name is Charles Stimson, and I am a Senior Legal Fellow at The Heritage Foundation, where I work on legal and policy issues related to national security, homeland security, and the criminal law. I am also a Commander in the United States Navy JAG Corps (Reserve Component), serving as a military trial judge. In my 18 years of service in the Navy, I have served three tours on active duty, including time as a prosecutor and defense attorney. I have been privileged to be a local, state, and federal prosecutor, and an adjunct law professor at The George Mason

School of Law and the Naval Justice School. Most relevant to today's hearing, from 2006 through 2007 I served as Deputy Assistant Secretary of Defense for Detainee Affairs, a position created in 2004 to advise the Secretary of Defense on all matters related to Department of Defense detainees, including those in Iraq, Afghanistan, and Guantanamo Bay.

The views I express in this testimony are my own, and should not be construed as representing any official position of The Heritage Foundation, the Department of Defense, the Department of the Navy, or the Navy Judge Advocate General's Corps.

Today, there is broad bi-partisan consensus that military commissions provide robust procedural protections to those prosecuted, are appropriately adapted to the needs and exigencies of the war on terrorism, and, ultimately, are the appropriate venue for trying terrorists who commit war crimes.

The breadth of this consensus, on a topic that had sown division only a few years in the past, is remarkable. President Obama, for one, has said that military commissions "are an appropriate venue for trying detainees for violations of the laws of war" because "[t]hey allow for protection of sensitive sources and methods of intelligence gathering . . . [and for] the safety and security of participants and for the presentation of evidence gathered from the battlefield that cannot always be effectively presented in Federal courts."¹

Senator Carl Levin, Chairman of the Senate Armed Services Committee, said at the introduction of the Military Commissions Act of 2009 before his committee that he believed commissions "can play a legitimate role in prosecuting violations of the law of war."²

Ranking Member John McCain echoed that sentiment. He said: "I believe we've made substantial progress that will strengthen the military commissions system during appellate review, provide a careful balance between the protection of national security and American values, and allow the trials to move forward with greater efficiency toward a just and fair result."³

This bi-partisan consensus makes sense, especially when one understands the robust due process rights and procedural protections contained within the reformed military commissions. What does not make sense is the Obama Administration's continued policy of delayed justice and failure to refer cases to military commissions.

To move the process forward, three points must be understood. The first is that we are at war and that military commissions provide essential capabilities, which are unavailable in federal courts, in support of the war effort. The second is that, under current law, commissions provide due process protections that are unparalleled in the history of war crimes tribunals, and they provide these safeguards *right now*, not at some uncertain future date. The third is that, putting it all together, there is no excuse for further delay in referring 9/11 cases to trial by military commissions.

Let me address each point in turn.

First, we are at war, and there are strong practical considerations militating in favor of the use of commissions. In the years leading up to September 11, 2001, acts of transnational terrorism that affected United States interests were treated, for the most part, as criminal law matters in federal court. The United States was not in a continuing legal state of armed conflict, and the use of federal courts was the only litigation option for bringing terrorists to justice.

As a former federal prosecutor, I have immense respect for our federal courts. Federal terrorism prosecutors have the requisite experience in trying complex cases and federal courts will continue to play a role in this war.

For example, I supported the administration when it sent Ahmed Ghailani to federal court for his role in the 1998 embassy bombing case. The facts of that case were unique. For instance, the sites of the acts were treated as crime scenes from the moment the bombs went off; law enforcement officials from Kenya, Tanzania, and the United States preserved valuable evidence from the beginning, including reading suspects rights warnings; all evidence was collected prior to 9/11; and the co-

¹Remarks by the President on National Security, THE WHITE HOUSE, May 21, 2009, http://www.whitehouse.gov/the_press_office/Remarks-by-the-President-On-National-Security-5-21-09/.

²Senator Carl Levin, Opening Statement at Senate Committee on Armed Services Hearing to Receive Testimony on Legal Issues Regarding Military Commissions and the Trial of Detainees for Violations of the Law of War, July 7, 2009, http://www.loc.gov/rr/frd/Military_Law/pdf/Senate-Armed-Services-July-7-2009.pdf.

³Senator John McCain, Statement at Senate Committee on Armed Services Hearing to Receive Testimony on Legal Issues Regarding Military Commissions and the Trial of Detainees for Violations of the Law of War, July 7, 2009, http://www.loc.gov/rr/frd/Military_Law/pdf/Senate-Armed-Services-July-7-2009.pdf.

conspirators were tried, convicted, and sentenced to long sentences before 9/11. Ghailani was indicted for his crimes at the time, but was not apprehended until after 9/11. Trying Ghailani in federal court for that pre-9/11 terrorist act was simply finishing up the unfinished business of the 1998 embassy bombing cases.⁴

But the events of 9/11 have forced our leaders, including Presidents Bush and Obama, to recognize the need to have at their disposal all lawful tools, including military commissions, to confront and defeat this enemy.

Consider the litigating risks of trying Khalid Sheikh Mohammad, or “KSM,” in federal court, versus before a military commission. Some of those risks are similar. For example, in both venues, KSM will likely attempt to take advantage of the “stage” of the courtroom to spew out his hatred of the West and embrace the call to global jihad. Similarly, regardless of where KSM is tried, the trial will take years to finish, as there will be substantial pretrial discovery, myriad motions, and long delays.

But military commissions do not give unprivileged enemy belligerents all of the rights guaranteed to criminal defendants in federal court, and they shouldn’t. Furthermore, as the judge in the Salim Hamdan military commissions’ trial wrote, “. . . the Geneva Conventions expressly contemplate tribunals for unlawful combatants that are less protective of their rights than the forum guaranteed to lawful combatants.”⁵

Consider just one right, the right to a speedy trial, which is guaranteed to criminal defendants in federal court by the Sixth Amendment.⁶ In the federal terrorism trial of Ahmed Ghailani, the federal district judge issued a ruling on whether the government had violated Ghailani’s speedy trial rights. In denying Ghailani’s motion, he analyzed the underlying facts and utilized the four-factors enumerated in *Barker v. Wingo*. He found the government’s reason for delay “weak,” but nonetheless denied the motion.⁷ The ruling was close.

Here, if the Administration were to try KSM in federal court at this late date, there is a substantial risk that it would not be able to provide a credible legal justification for the years of delay in bringing him to trial. Lack of political courage in making a forum selection is not a cognizable legal excuse. The result: all charges would be dismissed in federal court. In a run-of-the-mill criminal trial, this might make sense: the government has to get on with its case or forfeit its ability to prosecute. But in war, the stakes are much higher.

The Military Commissions Act of 2009 does not give defendants a constitutional Sixth Amendment right to a speedy trial.

Another difference between military commissions and federal courts concerns hearsay. In federal court, hearsay is generally inadmissible,⁸ unless the offered statement falls into one of the exceptions to the general prohibition. Even if the out-of-court statement falls under an exception, otherwise relevant evidence may still be inadmissible as it might violate a defendant’s rights under the Sixth Amendment’s Confrontation Clause, and thus be inadmissible.⁹

But in military commissions and international tribunals, hearsay is admissible as long as the side offering the statement can demonstrate to the judge that it is reliable, material, probative, and that direct testimony from the witness is not available as a practical matter. Once admitted, the finder of fact then can decide what weight, if any, to give the statement.

This evidentiary difference is necessary and practical in the presentation of war crimes’ cases.

Keep in mind that this isn’t just a benefit to the prosecution. Both sides benefit from the use of the commissions’ hearsay rules, and the finder of fact has more information, not less, with which to render a considered judgment.

There is also the matter of incentives. The rules of war codified in the Geneva Conventions create a set of incentives for belligerents: follow the rules and, if you’re captured, you’ll be accorded the benefits of those rules. But by trying unprivileged enemy belligerents in federal court—instead of military commissions—we reward the violation of those rules and give those belligerents greater protections than a

⁴ Charles D. Stimson, *First—and Perhaps Last—Gitmo Inmate Brought to America*, June 13, 2009, <http://www.heritage.org/Research/Commentary/2009/06/First-and-perhaps-last-Gitmo-Inmate-Brought-to-America?RenderforPrint=1>.

⁵ Keith J. Allred, *Military Commissions: The Right Venue for KSM*, THE WALL STREET JOURNAL, Apr. 19, 2010, <http://online.wsj.com/article/SB10001424052748703444804575071880705027218.html>.

⁶ *Barker v. Wingo*, 407 U.S. 514 (1972).

⁷ *United States v. Ghailani*, No. S10 98 Crim. 1023(LAK), 2010 WL 2756546 at *16 (S.D.N.Y. July 12, 2010).

⁸ Fed. R. Evid. 801 (2011).

⁹ See *Crawford v. Washington*, 541 U.S. 36 (2004) *et seq.*

typical lawful prisoner of war would receive. This practice upends the carefully crafted incentive structure of the Geneva Conventions, and is harmful.

Finally, there is an ongoing debate among legal scholars as to whether the crimes of conspiracy and material support to terrorism are traditional war crimes. The debate continues, and likely will unless or until the United States Court of Military Commissions Review or higher appellate courts rule on the issue. But that debate is irrelevant to the topic at hand. The government has ample direct and circumstantial evidence to prove the 9/11 case, and can rely on traditional war crimes statutes to charge KSM and the 9/11 plotters.

Second, reformed military commissions provide robust protections to detainees, more so than any other international war crimes tribunal ever created. Indeed, they are specifically modeled after and adapted from the established procedures and rules of evidence found in the Uniform Code of Military Justice. Although neither traditional criminal law nor the law of war provide clear answers to the multitude of detainee issues that have arisen since 9/11, it is clear that under Common Article 3 of the Geneva Conventions and Supreme Court precedent, unlawful combatants are entitled to be tried by a “regularly constituted court that affords all the judicial guarantees . . . recognized as indispensable by civilized peoples.”

And when one compares the procedural protections and rules contained in the Military Commissions Act of 2009 to standard U.S. courts-martial and other international tribunals, as I have, you see that today’s commissions offers unlawful combatants more robust due process and protections than any international tribunal ever created.

The United States has led the world in the development of the law for a long time. The rules and procedures embodied in the Military Commissions Act of 2009 are fairer than the rules used at Nuremberg after World War II, the current International Criminal Court, and the International Criminal Courts of Yugoslavia and Rwanda. Perhaps in the years to come, international tribunals may look to the Military Commissions Act of 2009 as a model for enhancing their rules and procedures.

Those protections, which I have detailed in a comparison chart attached to my remarks, include but are not limited to:

1. The legal presumption of innocence throughout the trial;
2. Proof beyond a reasonable doubt is required to convict;
3. Protection from self-incrimination;
4. The right to be present whenever evidence is admitted;
5. The right to counsel;
6. The right to present and call witnesses;
7. The right to cross-examine government witnesses who appear in court;
8. The right to pretrial discovery of all evidence to be introduced at trial;
9. A prohibition on use of statements obtained through cruel, inhuman and degrading treatment
10. The right to remain silent, without any adverse inference;
11. The right to introduce evidence through expert witnesses; and
12. The right to introduce reliable hearsay evidence.

We should judge the fairness of these procedures by whether we would feel comfortable if our own military personnel were subjected to similar procedures. We should also ask whether they are consistent with our values as Americans.

The answer to both questions is “yes.” And that is not just my position, but the implicit position of the Obama Administration and inescapable conclusion of many Members of Congress from both sides of the aisle.

Finally, we are almost a decade from 9/11, and we still don’t have a decision on where these cases are to be tried. The victims haven’t had their day in court. That’s wrong. Delay also does not benefit the detainees, as they deserve a decision as well. At this point in time, it is time for leaders to lead, and make a decision. We pay our leaders to do just this. And for 10 years, no decision has been made.

The administration is to be commended for reforming and keeping military commissions. But it is now time for the administration to start referring cases to military commissions, including the 9/11 case. The President’s Detainee Policy Task Force concluded, “Justice for the many victims of the ruthless attacks of al Qaeda and its affiliates has been too long delayed.” The Administration has established a protocol governing the disposition of Guantanamo cases for prosecution. Any objective analysis of the three factors in that protocol leads to but one conclusion: the lead actors who caused the United States to go to war for 9/11 deserve a war crimes tribunal.

Members of Congress should call on the administration to take this step, to stop delaying, and to bring Khalid Sheikh Mohammad to justice in a military commission trial. Once that decision is made, it is imperative that the Congress provide the Ad-

ministration, and in particular the Office of Military Commissions, with those resources its needs to fully support both the defense and prosecution teams to carry out their respective duties.

I thank you for the opportunity to testify, and I look forward to our discussion.

ATTACHMENT



**Comparison of the Uniform Code of Military Justice (UCMJ),
Military Commissions Act of 2009 (MCA 2009),
International Criminal Tribunal of Yugoslavia (ICTY)
and the International Criminal Tribunal of Rwanda (ICTR)**

UCMJ	MCA 2009	ICTY/ICTR
Prosecution may not appeal acquittal of accused because violates Double Jeopardy clause of the 5th Amendment to the U.S. Constitution	Prosecution may not appeal acquittal of accused	Prosecution may appeal acquittal of accused. ICTYSt. Art. 25.
Accused has right to be present whenever evidence is admitted into evidence. MRE 505.	Accused has right to be present whenever evidence is admitted into evidence. Rule 505.	Accused has right to be present whenever evidence is admitted into evidence. ICTYSt. Art. 21(4)(d).
Finding of guilt must be with concurrence of at least 2/3 of the military jury in non-capital cases.	Finding of guilt must be with concurrence of at least 2/3 of the military jury in non-capital cases.	Findings must be by majority (2/3 at the trial level). ICTYST. Art. 23(2).
Government has privilege to disclose classified information. MRE 505.	Government has privilege not to disclose information. Rule 505.	Prosecution may not disclose confidential information to anyone without the express consent of the person or entity providing the information. ICTYRPE 70.
Presumption of innocence	Presumption of innocence	Presumption of innocence. ICTYSt. Art. 21(3).
Proof beyond a reasonable doubt	Proof beyond a reasonable doubt	Proof beyond a reasonable doubt. ICTYRPE 87(A).
Presence of accused at all in-court proceedings of the trial	Presence of accused at all in-court proceedings of the trial	Presence of accused at all in-court proceedings of the trial, unless waived by the accused. ICTYSt. Art. 21(4)(d). Court may accept evidence from accused and/or his attorney. ICTYSt. Art. 22.
Free independent military defense counsel and option to retain civilian defense	Free independent military defense counsel and option to retain civilian defense	Free independent military defense counsel upon demonstration of indigency

UCMJ	MCA 2009	ICTY/ICTR
counsel	counsel	and option to retain defense counsel of choice if not indigent. Office of Legal and Defence Affairs maintains a list of qualified DC who can be appointed and (subject to availability) an indigent accused may select DC of his choice from that list to represent him at Tribunal expense. Accused who are deemed to be partially indigent may be required to pay a small percentage of these costs. ICTYSt. Art. 21(4)(b); ICTYSt. Art. 21(4)(d); ICTYRPE 44; ICTYRPE 45; Regulations Governing Assignment of Counsel.
Right to present evidence and call witnesses	Right to present evidence and call witnesses	Right to present evidence and call witnesses. ICTYSt. Art. 21(4)(e).
Right of accused to be provided evidence, before trial, to be introduced against him at trial	Right of accused to be provided evidence, before trial, to be introduced against him at trial	Right of accused to be provided evidence, before trial, to be introduced against him at trial. ICTYRPE 66-68.
Protection from self-incrimination	Protection from self-incrimination	Protection from self-incrimination. ICTYSt. Art. 21(4)(g).
Right to represent self at trial, if approved by judge	Right to represent self at trial, if approved by judge	Right to represent self at trial, if approved by judge. ICTYSt. Art. 21(4)(d).
Suppression of accused's statements if they were taken in violation of his rights or derived by torture or other illegal means	Suppression of accused's statements if they were obtained by cruel, inhuman or degrading treatment	Suppression of accused's statements if they were taken in violation of his rights or if obtained by methods which cast substantial doubt on its reliability or if its admission is antithetical to, and would seriously damage, the integrity of the proceedings. ICTYRPE 95.

UCMJ	MCA 2009	ICTY/ICTR
Prohibition against drawing adverse inference if accused exercises his 5th Amendment right not to testify	Prohibition against drawing adverse inference if accused chooses not to testify	Prohibition against drawing adverse inference if accused chooses not to testify
Possibility to appeal to military appellate court, and possible appeal to U.S. Supreme Court	Absolute right to appeal to two independent appellate courts: The Court of Military Commission Review; The U.S. Court of Appeals for the District of Columbia Circuit; possible appeal to the U.S. Supreme Court	Absolute right to appeal to Appeals Chamber. Appeal Chamber judges are composed of trial judges. (only one appellate level). In accordance with international law, the prosecution may also appeal acquittals. ICTYSt. Art. 25.
Evidence is deemed relevant and admissible if it has “any tendency to make an issue in the case more or less probable.” MRE 401.	Evidence is deemed relevant and admissible if it has “probative value to a reasonable person”—when the existence of any fact of consequence is “more probable or less probable” to a reasonable person	A Chamber may admit any relevant evidence which it deems to have probative value. ICTYRPE 89(C).
Military judge can exclude evidence if the probative value of the evidence is substantially outweighed by the danger of unfair prejudice. MRE 403	Military judge can exclude evidence if the probative value of the evidence is substantially outweighed by the danger of unfair prejudice. Rule 403	A Chamber may exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial. ICTYRPE 89(D).
Prohibits the admission of character evidence to prove conduct. MRE 404.	Prohibits the admission of character evidence to prove conduct. Rule 404	No specific rule
Prohibits admission of plea discussions. MRE 410.	Prohibits admission of plea discussions. Rule 410.	No specific rule
Provides for the attorney-client privilege. MRE 502	Provides for the attorney-client privilege. Rule 502	Provides for the attorney-client privilege. ICTYRPE 97.
Provides a privilege against disclosures of communications between accused and his clergy. MRE 503	Provides for a privilege against disclosures of communications between accused and his clergy. Rule 503	No specific rule
Provides a husband-wife privilege. MRE 504	Provides a husband-wife privilege. Rule 504	No specific rule
Right of government to present classified evidence	Right of government to present classified evidence	No similar provision. Trial judge may not order either

UCMJ	MCA 2009	ICTY/ICTR
to Military Judge for his inspection – without showing the defense attorney or accused—in order for Military Judge to determine whether or not the evidence is capable of being admitted in an unclassified format. MRE 505	to Military Judge for his inspection – without showing the defense attorney or accused—in order for Military Judge to determine whether or not the evidence is capable of being admitted in an unclassified format. Rule 505	party to produce additional evidence related to confidential information. Judge may not order the attendance of witnesses to compel additional information regarding the confidential information. ICTYRPE 70.
Government has the privilege to refuse to disclose the identity of informants. MRE 507	Government has the privilege to refuse to disclose the identity of informants. Rule 507.	Appellate decisions have recognized the government’s right to refuse to disclose the identity of victims and witnesses to the accused, his attorney, the public and the media under exceptional circumstances. ICTYSt. Art. 21 and 22.
Psychotherapist-patient privilege. MRE 513.	Psychotherapist-patient privilege. Rule 513.	No specific rule.
Prohibition against using a person’s religious beliefs against him. MRE 610	Prohibition against using a person’s religious beliefs against him. Rule 610.	No specific rule
Availability to introduce evidence through a court-recognized “expert” witness. MRE 702.	Availability to introduce evidence through a court-recognized “expert” witness. Rule 702	Availability to introduce evidence through a court-recognized “expert” witness. ICTYRPE 94.
Prohibition against admitting results of polygraph examinations. MRE 707.	Prohibition against admitting results of polygraph examinations. Rule 707.	No specific rule
Hearsay evidence generally not admissible unless there is an exception to the rule (at least 24 exceptions noted in rule). MRE 802.	Hearsay is admissible only if the party offering the evidence provides notice, <u>and</u> the military judge finds that the statement is reliable, material, and probative, <u>and</u> direct testimony is not available, <u>and</u> the interests of justice will be served by admission of the statement. Rule 803.	Hearsay is allowed. Question of weight. Falls within general rules of evidence. Evidence excluded only if its probative value is “substantially outweighed by the need to ensure a fair trial.” ICTYRPE 89.
Evidence allowed from unavailable witnesses under	Evidence allowed from unavailable witnesses under	Evidence allowed from unavailable witnesses under

UCMJ	MCA 2009	ICTY/ICTR
certain circumstances. MRE 804.	certain circumstances as long as it is found to be reliable	certain circumstances. ICTYRPE 92.
In capital cases, must have 12 person jury and vote must be unanimous for guilty	In capital cases, must have 12 person jury and vote must be unanimous for guilty	No capital cases
In capital cases, for death sentence to be adjudged by jury, all 12 jurors have to vote for death; otherwise, accused sentenced to lesser sentence	In capital cases, for death sentence to be adjudged by jury, all 12 jurors have to vote for death; otherwise, accused sentenced to lesser sentence	No capital cases
Complies with U.S. Constitution and federal issues	All necessary judicial guarantees which are recognized as indispensable by civilized peoples for purposes of Common Art. 3 of the Geneva Conventions	ICTY/ICTR comply with all applicable international legal standards concerning international Humanitarian Law and International Human Rights Law

* ICTY and ICTR Statutes are identical on all key topics discussed here. The ICTR Statute, however, has one fewer article in the substantive law section, and as a result the article numbers are different. ICTY Statute ("ICTYSt.") Article 21 corresponds to ICTR Statute Article 20. Similarly, the ICTR Rules of Procedure and Evidence are based upon, and therefore virtually identical to, the ICTY Rules of Procedure and Evidence ("ICTYRPE"). This chart refers to the ICTYRPE only. The corresponding ICTR provisions can be easily found at: <http://www.ictj.org>.

"MRE" is Military Rules of Evidence

Mr. SENSENBRENNER. Thank you very much, Mr. Stimson.
Ms. Hessler?

**TESTIMONY OF STEPHANIE HESSLER, FELLOW,
MANHATTAN INSTITUTE FOR POLICY RESEARCH**

Ms. HESSLER. Chairman Sensenbrenner, Ranking Member Scott, Members of the Committee, I thank you for the opportunity to express my views about the use of military commissions to prosecute the September 11 plotters.

In my view, the 9/11 conspirators should be tried by military commission, not in Federal court. I support the President's decision announced yesterday that Khalid Sheikh Mohammed and nine others will have a military trial, and I commend Congress for the pivotal role it played in helping the Administration reach this decision.

I will begin by briefly outlining the legal authority for military commissions. Our Founders understood the difference between keeping internal order through the criminal justice system and protecting against external threats from our enemies. The Constitution gives Congress the power to define and punish offenses against the law of nations. Congress has repeatedly exercised this power to establish military commissions.

Indeed, the United States has used military tribunals throughout its history, including in the War of 1812, the Mexican-American War, the Civil War, and World War II. As the Supreme Court confirmed in *Ex parte Quirin*, quote, unlawful combatants are subject to trial and punishment by military tribunal.

Shortly after the September 11 attacks, President Bush established military commissions to try foreign jihadists for war crimes. In 2006, the Supreme Court ruled in *Hamdan v. Rumsfeld* that military commissions needed congressional approval and invited Congress to enact legislation. Soon after, Bipartisan majorities of Congress passed the Military Commissions Act of 2006, which was amended in 2009.

Before the September 11 attacks and the subsequent establishment of military commissions, we had to try foreign jihadists in the criminal justice system. But as we learned on 9/11, trying alleged terrorists after an attack does little to prevent the next one. After September 11, we changed our approach to terrorism, shifting focus from punishment to prevention.

For at least three reasons, our prosecuting foreign war criminals in Federal court may undermine counterterrorism goals. And military commissions are specifically designed to mitigate these risks.

First and foremost, we need to protect classified information from our enemies. Acquiring intelligence is one of the most crucial means for penetrating and dismantling terror networks. Obtaining classified information can be a prolonged, painstaking, and often very dangerous job for our intelligence agents. Such information must be vigorously safeguarded.

Criminal trials, however, risk disclosing top secret information to our enemies. A Federal judge has discretion to order classified materials released, and if the Government does not comply, the judge may order the indictment dismissed. The Government may be in a

catch 22 of either disclosing classified intelligence or risking dismissal of charges.

Congress sensibly addressed this issue in the MCA. The Government may redact and summarize material and cannot be compelled to disclose classified information to anyone lacking a security clearance.

Likewise, we must protect information that is not classified but could, nonetheless, aid our enemies in their fight against us. Because criminal court proceedings are required to be public under the Sixth Amendment, sensitive information may freely flow to our enemies. For example, in the trial of Sheikh Omar Abdel-Rahman for the 1993 World Trade Center bombings, the prosecution made a routine disclosure to the defense lawyer of a list of unindicted co-conspirators. We learned later that this valuable list of key terror suspects reached Osama bin Laden halfway around the world within 10 days.

Likewise in that case, there was extensive data about the engineering and construction of the World Trade Center. It is certainly possible that terrorists used this information to design and plot the attacks that destroyed the buildings a few years later.

Congress recognized that the transparency of criminal trials may undermine our national security. Therefore, while military trials are generally public, a judge is permitted to close proceedings in order to protect national security. This flexibility is vital to ensuring that terrorists do not turn into a feast of counterterrorism data for terrorists at large.

Second, bringing Federal criminal actions may not only reveal information, it may also impede intelligence gathering, as criminal defendants must be read Miranda warnings. But when an alien terrorist is apprehended, national security interests demand that we acquire information to prevent a future attack and neutralize security threats. Starting off with “you have the right to remain silent” is not the way to gain counterterrorism data. Congress recognized that reading terrorists Miranda warnings would severely hinder intelligence gathering and compromise counterterrorism efforts. Therefore, in military commissions, detainee statements are admissible if a judge determines that they are reliable, probative, and made during lawfully conducted military operations.

Third, Federal prosecutions can place an undue burden on military efforts.

In conclusion, it is the right decision to try the 9/11 plotters in military commissions, not in Federal court. Criminal trials may undermine our national security by revealing important information to our enemies, impeding intelligence gathering, and placing undue burden on military operations. There is no reason to gamble with America’s security.

[The prepared statement of Ms. Hessler follows:]

Prepared Statement of Stephanie Hessler

Mr. Chairman, Mr. Ranking Member, Members of the Committee: I thank you for the opportunity to express my views about the use of military commissions to prosecute the September 11th plotters and other detainees held at the Guantanamo Bay Detention Camp.

In my view, the 9/11 conspirators should be tried by military commission—not in federal court. I will focus my remarks on the risks of federal criminal prosecutions

and the ways in which military commissions may alleviate these risks. I will also comment briefly on the substantial due process that military commissions afford the accused.

I. LEGAL AUTHORITY FOR MILITARY COMMISSIONS

I would like to begin by briefly outlining the legal authority for military commissions. Our founders understood the difference between keeping *internal* order, through the criminal justice system, and protecting against *external* threats from our enemies, through military action. Article I, Section 8, clause 10, of the Constitution gives Congress the power to “define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations.” Congress has repeatedly exercised this power to establish military commissions.

Indeed, the United States has used military tribunals throughout its history, including in the War of 1812, the Mexican-American War, the Civil War and World War II. As the Supreme Court confirmed in *Ex Parte Quirin*, “unlawful combatants are . . . subject to trial and punishment by military tribunal.”¹

Shortly after terrorists attacked us on September 11th, President Bush established military commissions to try foreign jihadists for war crimes. In 2006, the Supreme Court ruled in *Hamdan v. Rumsfeld* that the Uniform Code of Military Justice required certain procedural protections for military commissions and invited Congress to enact legislation.² In reaction to *Hamdan*, bipartisan majorities of Congress passed the Military Commissions Act of 2006, which was amended in 2009 (“the MCA”).

II. MILITARY COMMISSIONS ALLEVIATE THE RISKS INVOLVED WITH FEDERAL CRIMINAL PROSECUTIONS FOR UNLAWFUL ENEMY COMBATANTS.

In the years before the September 11th attacks and the subsequent establishment of military commissions, foreign terrorists were tried in our criminal justice system. But as we learned on 9/11, trying alleged terrorists after an attack does little to prevent the next one. After September 11th, we changed our approach to terrorism—shifting focus from punishment to prevention.

For at least three reasons, prosecuting foreign war criminals in federal court may undermine our counterterrorism goals. Civilian trials may (A) reveal classified and sensitive information to our enemies, (B) hinder intelligence gathering, and (C) burden military operations abroad. The military commissions enacted by Congress are specifically designed to alleviate these risks while granting the accused substantial procedural protections.

A. Protecting Information

i. Classified Intelligence

First and foremost, we need to protect classified information from our enemies. Acquiring intelligence is one of the most crucial means for penetrating and dismantling terror networks and protecting our national security. Obtaining classified communications and operational capabilities of terrorist groups can be a prolonged, painstaking and often very dangerous job for our intelligence agents. Such information—including sources and methods of intelligence gathering—must be vigorously safeguarded.

Criminal trials, however, risk disclosing top-secret information to our enemies. In such a trial, the federal judge has discretion to order classified materials released if it deems substitutes inadequate.³ And, if the government refuses to disclose classified information, the judge may order the indictment dismissed.⁴ This can put the government in a catch-22 of either disclosing classified intelligence or risking dismissal of charges.

Congress sensibly addressed this issue in the Military Commissions Act. In a military trial, the Government cannot be compelled to disclose classified information to anyone who does not have the proper security clearance.⁵ If the judge determines that access to the information is necessary, the government may redact portions of

¹ *Ex Parte Quirin*, 317 U.S. 1, 31 (1942).

² 548 U.S. 557 (2006).

³ Classified Information Procedures Act, 18 U.S.C. App.3; *See also* U.S. CONST. Amend. VI. (granting the accused the right “to be confronted with the witnesses against him.”).

⁴ Classified Information Procedures Act, 18 U.S.C. App.3.

⁵ Military Commissions Act, 10 U.S.C. 949 p-1(a) (“Classified information shall be protected and is privileged from disclosure if disclosure would be detrimental to the national security. Under no circumstance may a military judge order the release of classified information to any person not authorized to receive such information.”).

the information, submit a summary, or substitute a statement admitting facts that the classified material would tend to prove.⁶ Furthermore, such an order by a military judge may not be reconsidered.⁷

ii. Sensitive Information

Likewise, the United States also has an interest in protecting information that may not be classified but could nonetheless aid our enemies in their fight against us. Because criminal court proceedings are required to be public under the Sixth Amendment of the Constitution, sensitive information may freely flow to our enemies.⁸ For example, in the trial of Sheikh Omar Abdel-Rahman for the 1993 World Trade Center bombings, the prosecution made a routine disclosure to the defense lawyer of a list of unindicted co-conspirators. According to Andrew McCarthy who prosecuted the case, this valuable list of key terror suspects reached Osama bin Laden, halfway around the world, within ten days.⁹

Likewise, in that case, there was extensive data about the engineering and construction of the World Trade Center building.¹⁰ It is certainly possible that terrorists used this information to design and plot the attacks that destroyed the buildings a few years later.

Congress recognized that the transparency of criminal trials may undermine the goal of protecting our national security. Therefore, the Military Commissions Act provides that while military trials are generally public, the judge is permitted to close proceedings in order to protect national security interests, safeguarding intelligence and law enforcement sources, methods and activities.¹¹ This flexibility is vital to ensuring that trials do not turn into a feast of national security information for terrorists at-large.

B. Miranda Warnings Impede Intelligence Gathering

Bringing federal criminal actions may not only reveal sensitive information, it may also impede intelligence gathering. The Fifth Amendment of the Constitution protects criminal defendants from self-incrimination.¹² The Supreme Court has held that statements of the accused are not permitted in criminal trials unless the defendant was advised of his rights.¹³ FBI and law enforcement generally read Miranda warnings immediately upon arrest so as to preserve evidence for prosecution.

But the U.S. Constitution does not give foreign wartime enemies the privilege to be tried in federal court and thus shielded from self-incrimination. When an alien terrorist is apprehended, our national security interests demand that we acquire as much information as possible to prevent a future attack and neutralize security threats. Any intelligence officer will tell you that starting off with, “you have the right to remain silent . . .” is not the way to gain counterterrorism data.

Take, for example, the case of Umar Farouk Abdulmutallab, otherwise known as the Christmas Day bomber. The self-professed al Qaeda-trained operative attempted to explode a flight from Amsterdam to Detroit the Christmas before last. Despite the fact that Abdulmutallab is a Nigerian national, with no right under any statute or the Constitution to be tried as a U.S. civilian, the Obama administration immediately decided to grant him the rights of a U.S. citizen. In a first round of questioning, he disclosed his al Qaeda training in Yemen and mentioned additional terrorist plots. But after only 50 minutes of questioning, he was given Miranda warnings and told he had the right to remain silent and the right to obtain a lawyer—compliments of the taxpayers he had just tried to explode. Needless to say, he quickly became reticent after receiving these warnings.

⁶ 10 U.S.C. 949 p-4(b) (“The military judge, in assessing the accused’s discovery of or access to classified information under this section, may authorize the United States—(A) to delete or withhold specified items of classified information; (B) to substitute a summary for classified information; or (C) to substitute a statement admitting relevant facts that the classified information or material would tend to prove.”).

⁷ 10 U.S.C. 949 p-4(c) (“An order of a military judge authorizing a request of the trial counsel to substitute, summarize, withhold, or prevent access to classified information under this section is not subject to a motion for reconsideration by the accused, if such order was entered pursuant to an ex parte showing under this section.”).

⁸ U.S. CONST. Amend. VI. (“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial.”).

⁹ Andrew C. McCarthy, *WILLFUL BLINDNESS: A MEMOIR OF THE JIHAD*, 2008 at 304.

¹⁰ Kenneth Anderson, *What to Do with Bin Laden and Al Qaeda Terrorists? A Qualified Defense of Military Commissions and United States Policy on Detainees at Guantanamo Bay Naval Base*, 25 Harv. J.L. & Pub. Policy 591 2002 at 609.

¹¹ 10 U.S.C. Section 949(d)(2)(a).

¹² U.S. CONST. Amend. V. (No person “shall be compelled in any criminal case to be a witness against himself.”).

¹³ *Miranda v. Arizona*, 384 U.S. 436 (1966).

Congress recognized that reading terrorists Miranda warnings would severely hinder intelligence gathering and compromise counterterrorism efforts. Therefore, in military commissions, detainees' statements are admissible if a judge determines that they are reliable, probative and made during lawfully conducted military operations.¹⁴

C. Federal Prosecutions May Burden Military Operations

Federal prosecutions may also burden military operations abroad. The facts in a transnational terrorism case often include second-hand statements, known as hearsay, which are generally prohibited in federal court.¹⁵ For example, key witnesses in such cases are often the soldiers or CIA agents who captured the defendant overseas. But these officers may still be engaged in combat abroad, and interrupting their counterterrorism mission to testify in federal court could place an undue burden on military efforts.

Given the unique challenge of prosecuting war crimes while hostilities are ongoing, the military commission rules allow the government greater flexibility to introduce second-hand statements. The Military Commissions Act allows hearsay to be admitted if the judge determines that the statement is reliable and probative and the witness is not available.¹⁶ In determining whether to admit second-hand statements, the judge is specifically directed to take into account "the adverse impacts on military or intelligence operations that would likely result from the production of the witness."¹⁷ Just as important, the hearsay rule is reciprocal.¹⁸ So the accused may admit material to prove his defense that would otherwise be excluded under the Federal Rules of Evidence.

III. UNLAWFUL ENEMY COMBATANTS ARE GRANTED SUBSTANTIAL DUE PROCESS

Finally, while the MCA mitigates many of the risks of criminal prosecution, it also affords the accused substantial procedural protections similar to those provided in federal court. In a military commission, (1) the accused is presumed innocent;¹⁹ (2) the Government must prove guilt beyond a reasonable doubt;²⁰ (3) the accused has a right to counsel;²¹ (4) he is protected from double jeopardy;²² (5) the government is obligated to disclose exculpatory evidence;²³ and (6) the accused has the right to appeal to a Military Review Court,²⁴ then the United States Court of Appeals for the DC Circuit and finally petition the US Supreme Court.²⁵

¹⁴ 10 U.S.C. 948r(c) ("A statement of the accused may be admitted in evidence in a military commission under this chapter only if the military judge finds—(1) that the totality of the circumstances renders the statement reliable and possessing sufficient probative value; and (2) that—(A) the statement was made incident to lawful conduct during military operations at the point of capture or during closely related active combat engagement, and the interests of justice would best be served by admission of the statement into evidence; or (B) the statement was voluntarily given.").

¹⁵ Federal Rules of Evidence 802; U.S. CONST. Amend. VI.

¹⁶ 10 U.S.C. 949a(b)(3)(D).

¹⁷ 10 U.S.C. 949a(b)(3)(D)(ii)(III).

¹⁸ 10 U.S.C. 949a(b)(3)(D).

¹⁹ 10 U.S.C. 949(l)(c)(1) ("the accused must be presumed to be innocent.").

²⁰ 10 U.S.C. 949(l)(c)(1) ("the accused must be presumed to be innocent until the accused's guilt is established by legal and competent evidence beyond a reasonable doubt.").

²¹ 10 U.S.C. 948(k) (Military defense counsel for a military commission under this chapter shall be detailed as soon as practicable.).

²² 10 U.S.C. 949(h) (No person may, without the person's consent, be tried by a military commission under this chapter a second time for the same offense.); 10 U.S.C. 950d(b) ("In no case may a proceeding in revision (i) reconsider a finding of not guilty of a specification or a ruling which amounts to a finding of not guilty.").

²³ 10 U.S.C. 949(j)(b) ("(1) As soon as practicable, trial counsel in a military commission under this chapter shall disclose to the defense the existence of any evidence that reasonably tends to (A) negate the guilt of the accused of an offense charged; or (B) reduce the degree of guilt of the accused with respect to an offense charged. (2) The trial counsel shall, as soon as practicable, disclose to the defense the existence of evidence that reasonably tends to impeach the credibility of a witness whom the government intends to call at trial. (3) The trial counsel shall, as soon as practicable upon a finding of guilt, disclose to the defense the existence of evidence that is not subject to paragraph (1) or paragraph (2) but that reasonably may be viewed as mitigation evidence at sentencing. (4) The disclosure obligations under this subsection encompass evidence that is known or reasonably should be known to any government officials who participated in the investigation and prosecution of the case against the defendant.").

²⁴ 10 U.S.C. 950 (f).

²⁵ 10 U.S.C. 950 (g).

V. CONCLUSION

In conclusion, the 9/11 plotters and other inmates held at Guantanamo should be tried in military commissions—not criminal court. Criminal trials may undermine our national security by revealing important information to our enemies, impeding intelligence gathering and placing an undue burden on military operations. There is no reason to gamble with America's security.

Mr. SENSENBRENNER. Thank you, Ms. Hessler.
Professor Saltzburg?

**TESTIMONY OF STEPHEN A. SALTZBURG, PROFESSOR OF LAW,
GEORGE WASHINGTON UNIVERSITY**

Mr. SALTZBURG. Thank you, Mr. Chairman and Ranking Member Scott.

I think there is agreement throughout the United States that it is outrageous that 10 years later KSM and his alleged colleagues have not been tried. Everybody wants them tried. If in fact they are guilty as they claim, everyone wants them punished, and it should be done as soon as possible.

The question is what is the right forum. The Attorney General has now said it is going to be military commissions. His hands are tied.

The sad fact is, because of the process from which we began in 2001 when military commissions were first proposed, throughout the next decade, the constant refrain was we need military commissions because it is going to be easier to convict them. And that is the perception throughout much of the world, that military commissions are the forum of choice because it is easier to convict. I agree with that. It is going to be easier to convict them in a military commission. There is no doubt about it. The rules make it easier, and that is because the Government writes the rules.

But what we ought to remember is this. The last word on those rules is not going to come from the executive. It is not going to come from this Congress. It is going to come from Federal judges, the same Federal judges who sit in Article III courts and have great pride in their ability to try terrorists and their commitment to the rule of law and their dedication to the same principles that everybody in this room shares. Now, those Federal judges down the road are going to ask whether the procedures were fair. Mr. Stimson says, well, maybe the speedy trial right would be violated if these defendants were tried in Federal court. Well, if that is so, maybe the Federal courts will say speedy trial applies even in commissions. We don't know. That is a big problem with commissions.

Let me remind you of something. It is not in my testimony, but it occurred to me. It is a point we shouldn't forget.

December 21, 1988 I was a Deputy Assistant Attorney General in the Reagan administration. It was the last month. I got a call from the command center. The command center said Pan Am 103 has just disappeared from the radar. What do you want to do? Everyone above me in the Department of Justice was at the White House at the Christmas party. And I was there with the decision to make, and after consulting with colleagues, I said you treat this as a terrorist incident until you know otherwise. This is 1988. If anybody says it is an over-reaction, you just tell them blame be-

cause there is not going to be a headline that says Pan Am 103 goes down and Justice goes home.

And I have looked at terrorism issues from that day till now, and I want to remind you of something. The two Libyans who finally we managed to extricate from Libya for trial, according to special procedures that were adopted—one was acquitted; one was convicted. I assume that the Subcommittee understands his conviction is not yet final. This is in 2011. He was convicted. He was imprisoned. He was given compassionate release. His appeal is still pending.

One of the problems with creating a new system is no one knows how it will turn out in the end, and before we go down that road, before we run the risk that 5 years from now we will have a court tell us the procedures were inadequate and therefore whatever guilty verdicts might be returned in a military commission in Guantanamo will be overturned by a Federal court, before we go that route, we ought to ask ourselves is that what we want to do. Do we want to send a message that there is something wrong with the judicial system that served us so well for more than 2 centuries, that showed us it can handle every single kind of case that comes its way?

I just urge you to consider, when you think about where the end game is, that it may be all well and good to say let's try him now, let's try him in commissions, but if 5 years from now, it turns out all we did was for naught, people are going to say it was the wrong choice and it was a bad choice and we had a better choice available.

Thank you.

[The prepared statement of Mr. Saltzburg follows:]

Prepared Statement of Stephen A. Saltzburg

Chairman Sensenbrenner, Ranking Member Scott and Members of the Subcommittee, I thank you for inviting me to testify before you on the subject of using military commissions to try the 9/11 conspirators.

REDEFINING THE QUESTION

I begin by noting that the real question is where to try those who are alleged to be conspirators. At the moment the five individuals who may be charged as principal participants in the horrific attacks on America that occurred on September 11, 2001 have not been prosecuted in any tribunal. They remain presumed innocent irrespective of the assumptions that have been made by many as to their responsibility for the hijacking of airplanes and the killing of innocent people.

TRY CASES IN ARTICLE III COURTS

My position on where those charged with the worst act of mass murder on American soil should be tried is clear: IN AN ARTICLE III COURT presided over by a judge appointed by the President and confirmed by the Senate and before a jury of American citizens chosen from a cross-section of the community as juries are chosen in the United States every working day.

THE REASONS FOR USING ARTICLE III COURTS

Why do I think it is important for the trial to be in an Article III court? There are a number of reasons, many of which have been well articulated by thoughtful people over the years since the 9/11 attacks:

1. Civilian courts are capable of handling complex terrorism and espionage cases. Their track record is strong. Over 400 terrorism-related suspects have been successfully tried in federal courts since 9/11. Only a handful of cases have been handled by military commissions, and the military commission process has been hampered by starts and stops, changes in the rules, and uncertainty about exactly how cases would proceed.

2. The life-tenure provided federal judges by the founders of this Nation is one of our fundamental guarantees that justice in federal courts will be impartial and that those who preside over criminal cases will not be beholden to the Executive. The independence of the federal judiciary is one of the factors that inspires confidence in the decisions rendered by federal courts. There is no comparable independence of military judges who preside over commissions.

3. A civilian jury is one of the greatest democratic institutions that we have. It is chosen from throughout the community. It is inclusive. Men and women serve together. People of all races and religions are called to serve together. Individuals with varying education, expertise and experience serve as a unit to assess the strength and weakness of evidence. The jurors are screened for bias, and challenges for cause and peremptory challenges offer protections against jurors who are partial. The judgment of such jurors—as, for example, those who assessed a fair punishment for Zacarias Moussaoui—benefits from the many different perspectives that jurors bring to their deliberations. Military commission members are not drawn from a similar cross-section of the community, are chosen by the Convening Authority who also brings the charges against an accused, and will never be viewed as being as fair and impartial as a civilian panel.

4. There is enormous skepticism about the fairness of military commissions that is largely explained by the now discredited procedures originally proposed to govern them. Had the procedures now in place as a result of the Military Commission Act of 2009 (“MCA 2009”) and improvements made by the Department of Defense been in place from the outset, some of the concerns about commissions would have been eliminated. But, the process has been slow and once doubts about the fairness of a tribunal arise, it is difficult if not impossible to eradicate them.

5. Many public figures have proclaimed that we ought to use military commissions because they provide a greater certainty of conviction. Such comments fuel the perception that the rules governing the commissions are adopted with an eye to increasing the probability of conviction and a severe sentence rather than increasing the likelihood of a fair and just proceeding. Our goal should be to try individuals charged with these acts of mass murder in a manner that convinces our people and those around the world who look to us for leadership in preserving and protecting the rule of law that we are guaranteeing a fair trial for all charged with crimes, even the worst crimes. Our citizens and those of other nations are most likely to be convinced by trials in federal courts.

6. The individuals charged with the 9/11 murders ought not be treated as warriors. We are in a fight against international terrorism. There is no mistake about it. But, terrorists who commit murder in the United States against innocent civilians are criminals who should be prosecuted as such. Those alleged to be responsible for the 9/11 attacks should be tried in civilian courts just as Timothy McVeigh was tried for the Oklahoma City bombing. He was proved to have been a murderer, sentenced to death, and executed. The federal court that tried him used the same procedures that govern criminal trials throughout the United States. Those procedures produced a fair trial and a just verdict. Those same procedures can and should be employed in trying those accused of the 9/11 attacks.

7. There is a place for military commissions in the prosecution of terrorists. They are most defensible when employed to prosecute individuals who attack American military targets abroad, where witnesses and evidence may be uniquely available. But, they are not the forum for trying the most serious charges of intentional murder committed on American soil that may ever be brought. That forum is a federal district court.

8. Some of the arguments made in favor of military commissions sound as though we do not trust civilian courts. The case of Ahmed Khalfan Ghailani is cited as an example of why we should avoid civilian courts. Although Ghailani was acquitted on all charges but one, his conviction on a conspiracy charge relating to the 1998 East Africa Embassy bombings led to a life sentence without the possibility of parole. The fact that a civilian jury found the evidence insufficient on the other charges ought to inspire confidence that the trial was fair, the government was put to its proof as required by the Constitution, and there is no reason to question the integrity of the guilty verdict of conspiracy.

Those that argue that the evidence deemed inadmissible against Ghailani would have been admissible in a military commission may be wrong. Judge Kaplan, the trial judge, stated in a footnote in his ruling that it was far from clear that the witness’s testimony would be admissible if Ghailani were being tried in a military commission because the MCA 2009 likely would require exclusion, but even if it did not the Constitution might do so even in a military commission proceeding.

9. Although the rules of evidence that currently govern military commissions are more favorable to the prosecution than either the Federal Rules of Evidence applica-

ble in federal courts or the Military Rules of Evidence applicable in courts-martial, there is uncertainty as to whether the commission's evidence rules will ultimately be held to satisfy the Constitution's guarantee of due process. We can be certain that the Federal Rules of Evidence will pass constitutional muster and that trials under those rules satisfy due process. The uncertainty as to whether the commission rules will ultimately be upheld is genuine and reason to avoid prosecuting the 9/11 cases in any forum other than an Article III court. The Supreme Court's decision in *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006), stands as a caution not to assume that federal courts that review commission proceedings will find that the procedure and evidence rules are constitutionally adequate.

10. A trial in civilian court that results in a conviction could be appealed to a federal circuit court. If the conviction is affirmed, the defendant could seek review in the United States Supreme Court. The appellate process is familiar and can be efficiently employed. Military commissions will employ an appellate process that is less familiar and more cumbersome. First, there is review by the Convening Authority. Second, there is review by the Court of Military Commission Review, a unique tribunal that was created specifically to review commission proceedings whose membership keeps changing. Third, there is review by the United States Court of Appeals for the District of Columbia Circuit. Finally, there is potential review by the United States Supreme Court. There is every reason to believe that the military commission appellate process will be more prolonged than its civilian counterpart.

RESPONSES TO THE ARGUMENTS AGAINST ARTICLE III COURTS

I am not persuaded that there is any insurmountable problem with trying those accused of the 9/11 murders in civilian court. So let me address some of the so-called problems.

1. Security for the trial will be prohibitively expensive and disruptive.

This could be true if the trial were held in lower Manhattan and the New York Police Department concluded that prudence required a massive security presence and a substantial cordoned-off area. Although some have questioned the need for such security and have pointed to the fact that Ghailani was transferred to New York City from Guantanamo and was tried without incident, I would not second-guess the NYPD. There is no requirement that the trial be held in New York, however. It could be held in the Eastern District of Virginia, where the Alexandria federal courthouse is already relatively secure.

The case could also be initiated in the Southern District of New York, and either side could move for a change of venue. The case could be tried, for example, in New Jersey where a federal court sits next to a detention facility and defendants may be moved from the facility to the court through an underground tunnel. Such a forum ought to cut security costs and ameliorate threat concerns considerably.

Moreover, if there were reason to believe that a specific threat of retaliation were directed at the location of a trial, an Article III trial could be convened at a military installation in the United States where security would presumably be adequate to thwart any attempt at retaliation.

There is surely good reason to question the assumption that if the trial is held in a military commission in Guantanamo, there will be no attempted retaliation by sympathizers of the defendants. After all, retaliation can be directed at any American facility; it need not be directed at the courthouse where a defendant is tried. The World Trade Center buildings were attacked as symbols. Any terrorist who sought to retaliate against the United States for trying those accused of the 9/11 attacks could choose another symbol far removed from the trial itself. So, no one should be choosing a military commission as a means of avoiding potential retaliation.

2. Civilian trials put judges and jurors at risk.

It is true that a federal judge who presides over a trial involving any individual associated with a criminal enterprise could be the target of retaliation. The danger is ever present when judges sentence a member of a group that is known to engage in violence. Yet, our federal judges have not hesitated to preside over these trials. Indeed, our judges fully understand that the rule of law would be weakened if they did not meet their responsibilities even at some risk. It is true security may be required for a judge after some cases, but we have provided it in the past and should be prepared to provide it when necessary to enable our judges to do their jobs.

What is true of physical locations is also true of people. One terrorist sympathizer could retaliate against the trial of another terrorist by retaliating against any government officer. There are no rules governing retaliation. A terrorist could retaliate against a military commission proceeding by targeting a judge, a member of Con-

gress, or a civilian who had nothing to do with the proceeding. The fact is that there is no way to guarantee that there will be no retaliation as a result of any trial.

As for jurors, federal courts have considerable experience impaneling anonymous juries and their use has been upheld by appellate courts. As a result, jurors have been willing to serve and have been safe from retaliation. There is no reason to believe that anonymous juries could not be employed in the 9/11 cases or that their use would put jurors at risk.

3. The prosecution has a better chance of convicting in military commissions than in civilian court.

I agree that this is true, but do not see it as a reason to choose commissions. Quite the contrary, I see it as one of the reasons that there is so much concern and distrust about commissions. Evidence that would never be admitted in a federal trial or a court-martial can be admitted in a commission proceeding. Why? The answer is that the Executive makes the rules. That does not equate with fair and just proceedings in the eyes of many. It also supports the notion that when federal courts finally do get to review commission proceedings they may find the rules favoring the government to deny due process to a defendant, as noted above.

Moreover, the rules that govern military commissions exclude some of the evidence would have been admissible under earlier sets of rules. Opponents of using the traditional criminal justice system claim that involuntary/coerced self-incriminating statements obtained from defendants would be inadmissible in our traditional criminal justice system, but would be admissible in the military commissions. However, Congress limited the admissibility of such statements in the MCA 2009 providing that: "No statement obtained by the use of torture or by cruel, inhuman, or degrading treatment (as defined by section 1003 of the Detainee Treatment Act of 2005 (42 U.S.C. 2000dd)), whether or not under color of law, shall be admissible in a military commission under this chapter, except against a person accused of torture or such treatment as evidence that the statement was made."

It is true that exceptions exist: "A statement of the accused may be admitted in evidence in a military commission under this chapter only if the military judge finds—"(1) that the totality of the circumstances renders the statement reliable and possessing sufficient probative value; and "(2) that—"(A) the statement was made incident to lawful conduct during military operations at the point of capture or during closely related active combat engagement, and the interests of justice would best be served by admission of the statement into evidence; or "(B) the statement was voluntarily given." Exactly what fits under (2)(A) is unclear. But (2)(B) seems to indicate that a coerced confession that would be inadmissible in federal court is equally inadmissible in commission proceedings.

4. Civilian trials can turn into a circus and provide a forum for defendants to insult and demean the memory of the victims of 9/11.

Civilian trials are among the most formal, controlled proceedings that governments experience because they are controlled by federal judges who have power to assure that litigants, lawyers and observers behave or are removed from the courtroom if they do not behave.

It is true that a defendant who takes the witness stand or who makes a statement during sentencing has the opportunity to say things that are insulting, demeaning, or even threatening. But, this is equally true in civilian trials and in military commissions. More importantly, the defendant does not get the last word. After Zacarias Moussaoui spoke to the court at sentencing, Judge Brinkema had the last word and informed him that he would have 23 hours a day in solitary confinement to contemplate the crimes he committed. She spoke the last words, and they represented the response of a nation. She was not the only federal judge to speak such words. Judge Coughenour of the Western District of Washington has noted the power of words when federal judges let convicted terrorists know that they are nothing more than mere criminals.

5. There are speedy trial concerns with proceeding in federal court after so much delay.

There are two responses to this concern. Judge Kaplan addressed the speedy trial issue in the Ghailani trial: "Although the delay of this proceeding was long and entirely the product of decisions for which the executive branch of our government is responsible, the decisions that caused the delay were not made for the purpose of gaining any advantage over Ghailani in the prosecution of this indictment. Two years of the delay served compelling interests of national security. None of the five year delay of this prosecution subjected Ghailani to a single day of incarceration that he would not otherwise have suffered. He would have been detained for that entire period as an enemy combatant regardless of the pendency of this indictment. None of that delay prejudiced any interests protected by the Speedy Trial Clause in any significant degree. In these specific circumstances, Ghailani's right to a

speedy trial has not been infringed." The same analysis ought to apply to 9/11 defendants.

But, if there is a speedy trial problem, there is no assurance that it would not be just as much of a problem in a commission proceeding. As I have noted, no one is sure what aspects of constitutional law ultimately will be held binding in commission proceedings. If it is unfair to try a defendant in a civilian court because of undue delay, it may be equally unfair to try that defendant in a military commission.

6. Classified information can be better handled in military commissions.

I disagree with this argument on the basis of substantial personal experience with classified information in federal criminal cases. During the Iran-Contra prosecutions by Independent Counsel Lawrence Walsh, I handled the classified information issues for the Department of Justice in the prosecution of Lt. Col. Oliver North. As a result, I became extremely familiar with the Classified Information Procedures Act. Dealing with classified information in a federal trial under the Act poses the same problems as dealing with classified privileged information in a court-martial under Military Rule of Evidence 505. Federal courts are as capable as military commissions of preparing "substitutes" for classified information that protect a defendant's right to confront the evidence against him and to offer relevant evidence in support of a defense. The process contemplated by Mil. Comm. R. Evid. 505 is similar to that which would occur in a federal court. Federal courts have demonstrated that they can protect confidential and classified information while moving federal criminal trials to a successful conclusion.

CONCLUSION

For the reasons stated above, I strongly believe that justice is best served by trying those accused of the 9/11 attacks in an Article III court.

Mr. SENSENBRENNER. Thank you, Professor Saltzburg.

The Chair will now recognize Members under the 5-minute rule to ask questions, alternating by side in the approximate order in which they appeared. And the Chair will defer his questions to the end and starts out by recognizing the gentleman from California, Mr. Lungren.

Mr. LUNGREN. Thank you very much, Mr. Chairman. First of all, I apologize for leading the applause after Mr. Beamer's testimony, but it was in my experience here one of the finest pieces of testimony that I have heard and apropos of everything that this hearing is about.

Mr. Saltzburg, you said that the Federal court system, presumably the Article III courts have been able to handle every case that has come its way. So you disagree with Judge Mukasey, former Attorney General who presided over the case involving the first attempt to take down the towers, when he said in retrospect it was not the right thing to do because it did reveal information that was helpful to our enemies.

Mr. SALTZBURG. I do disagree with him. I think it was the right thing to do. I would point out to you that some of the information that was revealed as a result of that trial was revealed because the prosecutor who prosecuted the case chose not to seek a protective order. Had he sought it—and he said to this day in retrospect he would have. And the list of co-conspirators, for example, that was referred to by Ms. Hessler is a list that was never protected. No one sought to—

Mr. LUNGREN. So you do disagree with Judge Mukasey who presided over that trial and has been involved in the prosecution of terrorist cases.

Secondly, is there something wrong with someone pleading guilty?

Mr. SALTZBURG. Nothing wrong with someone pleading guilty.

Mr. LUNGREN. If we had accepted the guilty plea of Khalid Sheikh Mohammed, wouldn't that have brought justice more quickly than we are talking about now, which is one of your major complaints?

Mr. SALTZBURG. Not if you think the death penalty is an appropriate penalty.

Mr. LUNGREN. Oh. You can't plead guilty and then receive the death penalty?

Mr. SALTZBURG. Not in a commission. You can in Federal court.

Mr. LUNGREN. I see. So one of your problems is you want him to get the death penalty and therefore we shouldn't have accepted that?

Mr. SALTZBURG. I don't like the death penalty, but in the case of these five alleged co-conspirators, the death penalty is on the table, and if ever there was a case in which it would be appropriate, this is it.

Mr. LUNGREN. Well, do you support the current Attorney General's complaint about the military commissions where his statement suggests that the quality of justice obtained there will not apparently be the same quality as obtained in an Article III court?

Mr. SALTZBURG. I don't know that I would phrase it the same way. I think he meant to say—I think the intent was to say that the procedures that have been tried, true, and tested in an Article III court are different, and they haven't been tried, true, and tested and may not withstand scrutiny.

Mr. LUNGREN. You don't have any question about the legal authority for military commissions themselves, do you?

Mr. SALTZBURG. I do not.

Mr. LUNGREN. So that in fact military commissions, appropriately established, are constitutional just as Article III courts are constitutional since both of them receive their power from the Constitution. Correct?

Mr. SALTZBURG. Appropriately constituted, no doubt that they are constitutional.

Mr. LUNGREN. Mr. Stimson, you have indicated that Article III courts are not appropriate under certain circumstances when we are dealing with enemy combatants. I use the old term "unlawful enemy combatants." It seems to me that seems to be appropriate, but I know we have some new nomenclature. But I think you know what I am talking about.

One of the points you made is that it seems rather strange that we would grant greater protections to those who do not follow what are understood to be the conventions of warfare than we do those who do. Isn't that sort of a missing argument that we have in this debate many, many different times, that part of the reason that you establish certain procedures is based on the fact that you assume that people are going to follow the known civil or at least the conventions of warfare?

Mr. STIMSON. They are, sir.

Mr. LUNGREN. Isn't that a perverse incentive that we are establishing if we somehow say they should get Article III courts as a matter of course?

Mr. STIMSON. It is important as a matter of policy to be consistent and send the message that the Geneva Conventions were put in place for in the first place, and that is follow the rules, carry your arms openly, be a privileged belligerent, and get accorded the status, the legal status, of prisoner of war, which means you can't be tried. You have combatant immunity. But if you fall outside of those rules, then you lose immunity and you can be tried for war crimes. My point is simply that by giving them a trial in an Article III court, we are upending the very purpose of the Geneva Conventions in the first place.

And if I could, Mr. Chairman, address the death penalty question at least now or at some other point—

Mr. SENSENBRENNER. Maybe some other point.

Mr. STIMSON. Thank you.

Mr. SENSENBRENNER. The gentleman's time has expired.

The gentleman from Virginia, Mr. Scott?

Mr. SCOTT. Thank you, Mr. Chairman.

Professor Saltzburg, can you relate the appellate process if you wanted to appeal a conviction in criminal court or appeal a conviction in the military commission, what process they would go through?

Mr. SALTZBURG. Sure. A person tried in an Article III district court, if convicted, would have a right of appeal to one of the courts of appeal throughout the country, the 11 numbered courts and the D.C. Circuit, and then a right to petition for review in the United States Supreme Court.

A person tried in a commission would first get review by the convening authority. Second, there is a special tribunal that is set up to—an ad hoc tribunal that is set up to review convictions. After that, there is review in the United States Court of Appeals for the District of Columbia. And if a conviction were to be upheld after that, there is potential review in the United States Supreme Court.

Mr. SCOTT. Which seems quicker?

Mr. SALTZBURG. Well, I think there is no doubt that a Federal district court trial with one appeal as a right is less cumbersome than the appellate rights provided in the military commission process.

Mr. SCOTT. And what about predictability?

Mr. SALTZBURG. Well, you have heard me on this. We know what to expect from Article III courts. We don't know how Article III courts will respond to military commission procedures.

Mr. SCOTT. Is there a limit on the charges that can be brought in a military commission as opposed to charges that can be brought in Federal court?

Mr. SALTZBURG. Yes. Commissions are there to try war crimes, and Article III courts can hear virtually any criminal charge that falls under Federal law.

Mr. SCOTT. And if you have a terrorist attack, is it necessarily a war crime that may not be found to be a war crime subject to a military commission?

Mr. SALTZBURG. Whether or not every attack—"attack" is the wrong word. Whether every crime committed by someone who is not an American against Americans is a terrorist act I think the answer is no. I mean, we have heard the rhetoric here is that we are at war with al Qaeda, we are at war with KSM. I think the truth of the matter is that the greatest victory KSM will have is to be treated as a warrior. The last thing that he and his co-conspirators want is to be treated as a common criminal.

Mr. SCOTT. Is the question of whether it is a war crime or a regular crime an appealable issue?

Mr. SALTZBURG. It will be. I think this tribunal knows that four Justices on the Supreme Court have cast doubt on whether conspiracy is a crime that can be prosecuted in a military commission.

Mr. SCOTT. In terms of those who will be conducting the crime, can you say a word about the experience that those who will be conducting a military commission have in conducting these trials, particularly as it relates to admissibility of evidence and handling classified material?

Mr. SALTZBURG. Let me say that I think that the military lawyers who have been assigned to be prosecutors—I have worked with some of them. I think they are excellent lawyers, as are the defense lawyers. They are doing their best.

I think Mr. Stimson is correct when he says they don't have the same experience as lawyers in the Department of Justice, particularly when it comes to handling sensitive information and using statutes like the Classified Information Procedures Act. There will be a learning curve and it would be improved, I would say, if DOD lawyers were detailed to work with them.

Mr. SCOTT. In terms of classified materials, can the same mistakes be made in a military commission, letting too much evidence out in the public that there have been complaints about in Federal court?

Mr. SALTZBURG. Absolutely. The basic procedures under the Classified Information Procedures Act in civilian court, under Military Rule of Evidence 505 in a court martial, and Military Commission Rule 505 in commissions—the rules are basically the same. The judge is supposed to take classified information and try to fashion substitutes for nonclassified information. Can there be a mistake? Absolutely.

Mr. SCOTT. A lot has been said about the possibility of retaliation if you have a Federal court. What is the importance of fairness and the indicia of fairness that would occur in a Federal court that may increase or decrease the possibility of retaliation of those involved in the trial?

Mr. SALTZBURG. The concern about a trial in New York was that al Qaeda sympathizers might retaliate because there was a trial. And the truth of the matter is anybody who sympathizes with KSM and the other defendants can retaliate anywhere they want against the United States, anywhere they would try to. There is no rule that says you only can retaliate against the city that is trying your case.

Mr. SCOTT. Mr. Chairman, before you drop the gavel, I just want to point out that complaints have been made about Ahmed

Ghailani who was tried in Federal court. He was given a life sentence at the end of the trial without the possibility of parole.

Mr. SENSENBRENNER. The gentleman's time has expired.

The gentleman from South Carolina, Mr. Gowdy?

Mr. GOWDY. Thank you, Mr. Chairman.

Professor Saltzburg, when Osama bin Laden is captured, do you advocate his trial in civilian court or a military commission?

Mr. SALTZBURG. In a civilian court where he has already been indicted.

Mr. GOWDY. You advocate that Osama bin Laden be given a Federal public defender with discovery rights and tried in civilian court.

Mr. SALTZBURG. Yes, I do.

Mr. GOWDY. I don't understand, Professor, your argument about this likelihood of conviction, that because military tribunals are more likely to convict than U.S. district courts, that we should not pick military tribunals because you will agree with me that the chances of a conviction are higher in Federal court than in State court. Right?

Mr. SALTZBURG. No, I don't agree with that.

Mr. GOWDY. Of course, they are. There is more than a 90 percent conviction rate in U.S. district court. More than 90 percent.

Mr. SALTZBURG. The guilty plea rate is 96—

Mr. GOWDY. I am talking about the conviction rate at trial. You disagree that you are more likely to be convicted at trial in U.S. district court than in State court.

Mr. SALTZBURG. I think the conviction rates are pretty comparable. It depends on what State, but are pretty comparable, Federal and State.

Mr. GOWDY. Virginia.

Mr. SALTZBURG. The Virginia conviction rate is as high in State court as it in Federal court.

Mr. GOWDY. Professor, given his confession which, as I have read it, it speaks to every element of the offense, what defense would you advocate on behalf of KSM and how would his defenses be adversely impacted by a military trial as opposed to a civilian trial?

Mr. SALTZBURG. I expect KSM to plead guilty. I expect that if he were tried in the Federal court, he would plead guilty because he has tried to plead guilty, and he has tried to plead guilty in a forum that permits the death penalty to be—

Mr. GOWDY. So he won't lose any significant rights if he is tried by a military tribunal and not tried in civilian court.

Mr. SALTZBURG. Well, the one thing that would be different is in an Article III court, we would have the Federal judge using the same care to make sure that that guilty plea was not influenced in any way by improper conduct—

Mr. GOWDY. That is a 15-minute colloquy between the defendant and the judge. Right? That can be done in military court. Right?

Mr. SALTZBURG. The colloquy will probably be slightly longer given the detention and the circumstances of the detention to assure that this is a knowing, voluntary, and intelligent plea.

Mr. GOWDY. Military tribunals—you don't get 12 jurors. Right? Like you do in civilian court.

Mr. SALTZBURG. Military tribunal—you have a right, if the death penalty is being sought, to 12 jurors unless 12—

Mr. GOWDY. Well, let's speak about the death penalty because you said in your testimony that one of the benefits of a civilian jury is that it is inclusive, period. But it is not inclusive because if you don't believe in the death penalty, you can't serve on a Federal death penalty jury. Correct?

Mr. SALTZBURG. If you are absolutely opposed to the death—

Mr. GOWDY. Not absolutely. If you just can't give it. If you cannot give the death penalty, you can't serve. Right?

Mr. SALTZBURG. If you absolutely can't give it. If you have reservations, you can serve.

Mr. GOWDY. Well, reservations that substantially impair your ability to give it.

Mr. SALTZBURG. Fair enough.

Mr. GOWDY. I mean, that is the Wainwright language. Right?

Mr. SALTZBURG. Right.

Mr. GOWDY. So there is no constitutional requirement of 12 jurors. Right?

Mr. SALTZBURG. Excuse me?

Mr. GOWDY. There is no constitutional requirement of 12 jurors.

Mr. SALTZBURG. No. The Supreme Court has held that a minimum of 6 is required.

Mr. GOWDY. There is no constitutional right of unanimity in jurors, is there?

Mr. SALTZBURG. Yes, actually there is in Federal court.

Mr. GOWDY. Where?

Mr. SALTZBURG. The Supreme Court, *Johnson v. Apodaca*.

Mr. GOWDY. I said constitutional. I didn't say Supreme Court. I said in the Constitution does it say that we require unanimity of jurors?

Mr. SALTZBURG. The Constitution doesn't say anything about unanimity. It doesn't say anything about numbers of jurors either.

Mr. GOWDY. Right. It doesn't have to be 12. It doesn't have to be unanimous.

Mr. SALTZBURG. If you are asking me what it says in the Constitution—

Mr. GOWDY. That is what I am asking.

Mr. SALTZBURG. The Constitution, as I think I just said, says nothing about unanimity or the number of jurors.

Mr. GOWDY. Are there better remedies in U.S. district court than in military tribunals for technical Miranda violations?

Mr. SALTZBURG. Are there better remedies in Federal district court?

Mr. GOWDY. Right. I mean, you have the exclusionary rule in U.S. district court. Right?

Mr. SALTZBURG. Yes, you do.

Mr. GOWDY. Which means it doesn't come in.

Mr. SALTZBURG. Correct.

Mr. GOWDY. Is that also true in military tribunals?

Mr. SALTZBURG. No. Miranda will not have the same applicability in military tribunals.

Mr. GOWDY. All right.

You also testified—or your writing—our citizens and those of other nations are more likely to be convinced by trials in Federal courts. Our citizens and those of other nations.

How many terrorists have been tried in civilian court in the United States?

Mr. SALTZBURG. More than 400.

Mr. GOWDY. And you think those other nations are convinced? Are you satisfied that the other nations are now overwhelmed with our sense of fairness and they respect us at such a high degree that nothing bad is going to happen to us if we try these people in military tribunals?

Mr. SALTZBURG. What I am convinced about is that the United States' system of justice is generally regarded as one of the fairest in the world, and that is largely because of the image of Federal courts.

Mr. SENSENBRENNER. The gentleman's time has expired.

The gentleman from Michigan, Mr. Conyers.

Mr. CONYERS. Thank you, Chairman Sensenbrenner.

Mr. Saltzburg, Professor Saltzburg, is it true that the military commission established under the Bush administration was flawed and needed improvement with the 2009 Military Commissions Act?

Mr. SALTZBURG. I believe so.

Mr. CONYERS. Do you happen to recall in what respects it was deficient?

Mr. SALTZBURG. Well, the Military Commissions Act of 2009 tightened the rules of evidence, made it clearer as to whether statements that were obtained through inhumane, cruel treatment could be admitted, under what circumstances a statement that was obtained shortly after somebody was detained on the battlefield could be admitted, and made clear that voluntary confessions could be admitted.

Mr. CONYERS. And you have already mentioned the fact we don't know what the Federal courts are going to do with military commissions even after they are used and the appeals that will come forward afterwards.

Mr. SALTZBURG. That's true. Under the Military Commissions Act of 2009, we have a combination. We have military commissions which will—initially convictions will be reviewed by this special tribunal, and then the conviction, if affirmed, will end up being reviewed by the District of Columbia Court of Appeals and maybe by the Supreme Court. And they will have the opportunity to consider constitutional challenges to any of the procedures that were used in the commissions.

Mr. CONYERS. Attorney Stimson, are you in agreement with that?

Mr. STIMSON. There is no doubt, Mr. Conyers, that there will be challenges to any convictions that occur under the military commissions. That is correct.

Mr. CONYERS. And do you too feel that the Military Commissions Act of 2009 corrected certain flaws that were in existence before then?

Mr. STIMSON. I think the reforms were helpful and necessary, sir.

Mr. CONYERS. You are probably aware of the fact that under the Bush administration, there were six cases completed by way of plea

bargains. I am sorry. Six cases and three were completed by plea bargains. Military commissions.

Mr. STIMSON. There have been six, Mr. Conyers. Two of the pleas actually occurred during the Obama administration. Mr. Cotter, who was a Canadian, and Al Qosi—actually I think three because Noor Uthman just pled too. That is correct. But the only actual trial, Mr. Conyers, was Salim Hamdan who was Osama bin Laden's driver and arms trafficker, and that was an actual trial in front of members to conclusion.

Mr. CONYERS. And he has been released.

Mr. STIMSON. Yes. He was repatriated back to his home country, sir.

Mr. CONYERS. Well, in view of that skimpy record of military commission activities, why do you think that there is such a great support for military commissions?

Mr. STIMSON. I think two reasons, sir. One, Mr. Conyers, is that in wartime, war criminals have traditionally and always should have war crimes tribunals.

Secondly, the goal should not be swiftness. Justice isn't swift. It should be fairness. And military officers who serve as members and the convening authority who is a uniformed military officer, actually retired JAG, understand better than civilians the context of war and what fairness is. And so if we judge the outcome based on the length of sentence, I think we are looking at it the wrong way. It is whether it is fair, and uniformed officers will render fair decisions.

Mr. SENSENBRENNER. The gentleman's time has expired.

The gentleman from Texas, Mr. Poe?

Mr. POE. Thank you, Mr. Chairman.

I have a question for each of you. It is the same question. Is the United States at war? Mr. Saltzburg, is the United States at war?

Mr. SALTZBURG. We are certainly at war in Afghanistan. We are certainly at war in Iraq. And we certainly have military forces being deployed in Libya.

Mr. POE. Ms. Hessler?

Mr. SALTZBURG. But if you are——

Mr. POE. Excuse me. I reclaim my time.

Ms. Hessler?

Ms. HESSLER. Yes, we are at war.

Mr. POE. Mr. Stimson?

Mr. STIMSON. Yes, Mr. Poe.

Mr. POE. And Mr. Beamer?

Mr. BEAMER. Yes.

Mr. POE. Since the Military Commissions Act of 2009, I have a concern that if—traditionally the Supreme Court says that if we give constitutional rights to a group, then we give it to the entire group, not just selected portions of that group. Therefore, if we try some jihadist terrorists under the Commissions Act in Federal court and try others in military tribunals under the commission, is there a constitutional due process problem with trying some over here and some over here? Mr. Stimson?

Mr. STIMSON. I am not sure the answer is yes. I think that is where you would like me to go.

Mr. POE. No. I just wonder what you think.

Mr. STIMSON. I am not sure the answer is yes. In fact, I think the answer is probably no. The executive has the ultimate decision in terms of the forum selection, and I don't think it would present an equal protection claim.

Mr. POE. Ms. Hessler, what do you think?

Ms. HESSLER. I am not sure if it would present an equal protection claim, but I would say that it is certainly counterproductive in that it looks a lot like forum shopping and we shouldn't really be dividing the detainees into two separate groups and, depending on what evidence we have, choosing a forum. That certainly looks quite unprincipled and against American principles.

Mr. POE. So you would say let's pick a horse and ride it and try them all in one place or the other.

Ms. HESSLER. I would say that since military commissions are fair—the President has said they are fair—this body enacted it by a bipartisan majority—I would say all enemy combatants should be tried there alike and they should all be treated equally.

Mr. POE. Mr. Beamer, I want to follow up on some comments that you made. We have talked a lot today about the accused defendants, terrorists. I think the same system that has been created to try terrorists should also protect the rights of victims of crime, such as your son and the others that were murdered on 9/11. Do you think that, just from your position, the importance of looking out and protecting the rights of victims, while we are certainly protecting the rights of these accused, would be better suited in a military tribunal or before a Federal court?

Mr. BEAMER. There is a long history of us using military commissions that we have heard.

The arguments about classified information, information gathering—the first time I heard the Attorney General discuss his position as the right way forward to have the trials in New York was I attended the Senate Judiciary Committee hearing back in November of 2009. And just the idea of enemy combatants being given rights, Miranda rights, lawyer up on the battlefield, not being able to collect intelligence—that is wrongheaded, completely wrongheaded.

And so many times during that testimony on that day, I heard the Attorney General answer to some difficult questions “I don't know.” That gave me no feeling of confidence that he knew about the proper way forward.

I am very concerned about victims rights. I am certainly concerned that the enemy combatants receive a fair trial, but I am not at all interested in conferring upon these people the rights of the American citizenry. Not at all.

Mr. POE. And one last question. Mr. Stimson, you talked about fairness. You know “fair” means different things to different people. Some people say fair is where you take your chickens or something, like that. But I want to ask you does our sense of fairness in the justice system also include the right to a speedy resolution. If we wait 10 years in any criminal case, whether it is in a military court or a Federal court, doesn't that seem to be unfair to all concerned?

Mr. STIMSON. It absolutely does, Mr. Poe, and not only does the defendant have a speedy trial right, but the victims—the victims

rights movement is sort of late in coming—deserve justice, and that means moving things along.

Mr. POE. Thank you, Mr. Chairman.

Mr. SENSENBRENNER. The gentleman's time has expired.

The gentleman from Puerto Rico, Mr. Pierluisi?

Mr. PIERLUISI. Thank you, Mr. Chairman.

I thank all the witnesses for appearing today, and I have to say that I am particularly pleased to see Professor Saltzburg. I am a graduate of George Washington University Law School. So welcome.

I am troubled and I hear some inconsistent messages here.

First thing, I have to relate to what you have been going through, Mr. Beamer. These are the most horrendous and atrocious crimes we could be talking about, and for you to be still waiting for justice, as you said, that really moves me. I know it hurts. You feel frustrated and probably angered by it, and I relate to it.

Having said this, it is kind of inconsistent I say because then I hear Professor Saltzburg say that the problem he sees with this military commission is that it is going to take forever. It is going to take a lot longer than dealing in Federal courts. And that is troubling. It makes no sense.

Now, I don't want to leave this in generalities. So the first thing I am going to ask Professor Saltzburg is what troubles you the most in terms of the procedures that these military commissions will be following. And I am looking at the District of Columbia Circuit Court of Appeals eventually reviewing these procedures, as you kind of said. So what troubles you the most when you compare Article III courts' procedures with these military commissions procedures?

Mr. SALTZBURG. I think there are two things, and I actually think that Mr. Stimson may have mentioned them accurately. The unknowns here are whether or not a Federal court will say there is the same kind of right of confrontation in a military commission, at least one that is in Guantanamo, as there is in an Article III court. It is very clear that evidence that would never be admissible in an Article III court because it is testimonial hearsay and hasn't been cross examined would be admissible in a military commission, provided a judge makes certain findings about reliability, and whether that will be upheld is something that we don't know.

The other question—I think it is related—is whether or not the looser standard for the admissibility of confessions, whether or not that will be deemed valid.

I think those are two of the main differences.

There are other similarities that I think—I want to be clear. The Military Commissions Act of 2009, in my judgment, really did improve the commission process. There is no doubt about it, and I don't mean to say that I know the answer to the question of what a Federal court will do. I just know there are big questions there.

Mr. PIERLUISI. Another thing that troubles me is when you all pretty much say that we are at war, and some of you I seem to understand or read you as saying there is a war against terrorism going on. And I suspect, I would assume, it is not going to end anytime soon. Now, who is going to be tried in these military commissions? Anybody alleged to be a terrorist? Is that what we are talk-

ing about, that anybody who is alleged—and I am addressing Mr. Stimson now. I want to hear from you on this. Are you saying then that we have like two separate sets of systems of justice here? One for pretty much everybody and then one for anybody who is suspected to be a terrorist. Is that what we are doing here?

Mr. STIMSON. Sir, as a legal matter, this Congress has defined, through the Military Commissions Act of 2009, those who are eligible for military commissions. It is a small subset of terrorists at large. They tend to almost all be in Guantanamo. At least that is the way this Administration and the previous have looked at it. And as Professor Saltzburg alluded, the reforms in 2009 that this Congress passed give the military judge the solemn duty to determine as a matter of law whether the person is an unprivileged enemy belligerent. And so it is several steps in the process. But, no, it is not a broad set of people.

Mr. PIERLUISI. Thank you.

Mr. SENSENBRENNER. The gentleman's time has expired.

The gentlewoman from Florida, Ms. Adams?

Ms. ADAMS. Thank you, Mr. Chairman.

Mr. Saltzburg, in your testimony you stated there is a place for military commissions in the prosecution of terrorists. They are most defensible when employed to prosecute individuals who attack American military targets abroad where witnesses and evidence may be uniquely available, but they are not the forum for trying the most serious charges of intentional murder committed on American soil that may ever be brought. The forum is a Federal court in your decision. In your statement, you say it is a Federal district court.

But using this, doesn't this mean that a terrorist can select his eventual prosecution venue should he or she be caught by choice of the target and where that target is attacked?

Mr. SALTZBURG. I believe that the choice is always made by our executive.

Ms. ADAMS. But given your words, you said "abroad." Did you not?

Mr. SALTZBURG. Yes.

Ms. ADAMS. Okay. So that would mean if they attacked here, such as what happened on 9/11, that that would be different in your eyes. Yes or no? I have got a short time and I want to get through my questions.

Mr. SALTZBURG. I believe yes, that there is a difference.

Ms. ADAMS. And you believe that Article III courts provide greater protections for the accused?

Mr. SALTZBURG. I do.

Ms. ADAMS. Does this not reward terrorists for striking civilians in our homeland under your first premise?

Mr. SALTZBURG. I don't believe that giving people fair trials is a reward to anybody.

Ms. ADAMS. But they could select their venue by their target selection. Correct? By your own words.

Mr. SALTZBURG. Yes. If I were given the choice in making a recommendation to the Attorney General, I would choose commissions sometimes and Article III courts on other occasions.

Ms. ADAMS. And you said something about the death penalty and if you were to do it in the Article III courts, it would be faster and less drawn out. Can you tell me what the average time someone is on death row, whether it is State, Federal courts awaiting their appeal process? What is the average time that they sit there waiting throughout all their appeals?

Mr. SALTZBURG. The average time in State court is many, many years.

Ms. ADAMS. Federal court?

Mr. SALTZBURG. Well, it depends on the cases. The Timothy McVeigh case, for example, was a situation in which he was tried in Federal court for mass murder. He was convicted in a Federal court and he was executed in a relatively short period of time.

Ms. ADAMS. Why was he executed? Didn't he waive some of his appeal processes?

Mr. SALTZBURG. He did.

Ms. ADAMS. So it was his decision to waive those processes, but if he had not, he probably still would be with us today, wouldn't he?

Mr. SALTZBURG. Well, I can't answer that. I don't know.

Ms. ADAMS. Now, you mentioned the tribunal process, the military commission, and then you mentioned the Libyan terrorists. And I am curious because when we did our check, it looked like Britain and the U.S.—Britain got this Libyan terrorist, and then he was tried in a Scottish military courtroom and the Netherlands. And you are equating that to what is going on in our military commissions. Correct?

Mr. SALTZBURG. I didn't equate it.

Ms. ADAMS. Well, you said that the length of the appeal and it is still ongoing today. Didn't you say it was the length of the appeal and it was still going on today and had something to do with the commission?

Mr. SALTZBURG. The appellate process has not ended in that case yet.

Ms. ADAMS. Correct. And so, therefore, it equates because it was a military commission even though it wasn't within our court system or a military commission.

Mr. SALTZBURG. The point I was making was simple. It was when you adopt new procedures that you haven't used and they are not tested—

Ms. ADAMS. But that was in another country, was it not?

Mr. SALTZBURG. Involving several other countries.

Ms. ADAMS. There you go. That is what I wanted to know.

Mr. Stimson, have you seen the court facility in Guantanamo Bay?

Mr. STIMSON. I have not only seen it, Ms. Adams, I headed the working group that put it together.

Ms. ADAMS. I just came back from there and it is a very uniquely designed, well designed in my eyes, courtroom, and I think it is one that will serve our country well and give the defendants, the detainees, a very fair trial.

I have a short period of time. I am going to stop my questions. I may submit some more.

But, Mr. Beamer, I for one am sorry for your loss, and I for one want to see you and the other families and other victims' families have the ability to have some sort of closure. It will never be closure. I understand that having lost someone myself. But you do deserve that type of closure, and we as the American people need to make sure they are brought to trial.

Thank you.

Mr. SENSENBRENNER. The gentlewoman's time has expired.

The gentleman from Illinois, Mr. Quigley.

Mr. QUIGLEY. Thank you, Mr. Chairman.

Again, Mr. Beamer, my regards as well. I don't think anyone can argue that the delay is inexcusable. This is over, obviously, several Administrations.

But let me say this to the whole panel as someone who has done 200 trials as well. I do think at least someone needs to talk about Miranda in terms of its effectiveness in getting information. I can't necessarily put my finger on it, but Mr. Saltzburg, perhaps you could start by helping me here.

If someone who is charged with something is mirandized, I think there is a lot of evidence that this moves them toward a more cooperative entity, a person, to work with. The Christmas Day bomber—and I will pronounce many of these names wrong—Allah Hussein Kirkto, John Walker Lindh, Mohammed Junaid Babar, David Headley, Eddis—I am not going to pronounce his name right. The alleged associate taken into custody in—he waived his Miranda rights and provided detailed information to the FBI about terrorist-related activities about himself and others in the U.S. and Pakistan. There are literally dozens here who were mirandized and were later extraordinarily cooperative. The justice system is an extraordinary source of information, and I would like to think that some of this has to do with people feeling that they are going to be treated at least with some quantum measure of fairness and their ability to cooperate and provide information to—it seems to be theme here—prevent future acts.

So I would like, Mr. Saltzburg, if you could respond, and then go back to the panel.

Mr. SALTZBURG. Let me be very quick so others can respond. Three points in response.

Number one, no one believes that when a soldier captures someone on the battlefield, they should mirandize them.

Mr. QUIGLEY. Right.

Mr. SALTZBURG. There is no rule like that.

Number two, the FBI in October of 2010 adopted a policy which is when you arrest someone and there is a national security issue on the table, that you may delay Miranda warnings in order to protect national security and then worry about the evidence you might need in a criminal case.

And number three, the FBI is really good at using Miranda as a tool to get people to cooperate, to get confessions. All you got to do is look at some of the nonclassified information that has been released about people who the FBI has persuaded to cooperate and provide enormous amounts of information. They are very good at it.

Mr. QUIGLEY. And, Ms. Hessler, I understand your point about intuitively it sort of seems that if you tell somebody they have a right to remain silent, but it does seem to be with good prosecutors at the local level, Federal level, and levels dealing with terrorists—it seems to have been a pretty darned effective tool to get people to cooperate to help prevent—to seek out other terrorists and to help prevent other future acts.

Ms. HESSLER. Well, I believe that there are a certain percent that do waive their rights. I believe it is 30 percent who choose to exercise their rights. So it is certainly taking a risk.

Mr. QUIGLEY. But also others who were mirandized have cooperated and given us valuable information.

Ms. HESSLER. And I would just say to give the example of the Christmas Day bomber, he was interrogated for 50 minutes and was quite forthcoming and, in fact, admitted that he was an al Qaeda terrorist and even discussed other plots. And then he was given his Miranda warnings and decided to exercise them.

Mr. QUIGLEY. Mr. Stimson?

Mr. STIMSON. Thank you for your question, Mr. Quigley.

As you know, Miranda is now constitutionally based, and so there is a more fundamental starting point and that is should we confer unprivileged enemy belligerents with constitutional rights or not. In a Miranda setting, as you know, the person has the right to simply stop talking, and I think the broader point here is that they can stop talking.

Mr. QUIGLEY. But let's just put the issues that anyone thinks what is fair, whether Miranda is constitutionally—doesn't it seem to be an effective tool? In the end, what you really want—forget that person—is you want other information. Ms. Hessler talked about preventing future acts. It seems to be a pretty effective tool that prosecutors use to get more information. It helps get that person to talk to you.

Mr. STIMSON. It is a tool that is required when moving toward Federal or State prosecution.

Mr. QUIGLEY. But don't you agree that in many cases it has helped us get information that helps us in the war against terrorism?

Mr. STIMSON. No. I think the—

Mr. QUIGLEY. Never. No examples.

Mr. STIMSON. The waiver of Miranda and the subsequent discussion has been helpful. It is the information itself, not the Miranda.

Mr. QUIGLEY. Despite the fact—

Mr. SENSENBRENNER. The gentleman's time has expired.

The gentleman from Texas, Mr. Gohmert, is recognized for 5 minutes.

Mr. GOHMERT. Thank you, Mr. Chairman.

And thank you to the witnesses for being here and giving us your insights.

And, Mr. Beamer, you should know that your son is an inspiration to so many of us and particularly me every day because of the courage he showed and his willingness to protect American lives.

Mr. BEAMER. Thank you.

Mr. GOHMERT. And it inspires me sometimes in dealing with my own party. But I appreciate so much what you have contributed to the world through your son Todd. So thank you for that.

To kind of accentuate some of the things that some of the witnesses have said, here is a blow-up from the New York Times, "5 Charged in the 9/11 Attacks." They seek to plead guilty from Guantanamo Bay, Cuba. And I have been down there in that courtroom. It was well designed. Thank you very much, Mr. Stimson and those that worked with you. But they indicated they wanted to plead guilty. And if you read the 6-page pleading the Khalid Sheikh Mohammed did himself that has been declassified so we could read it, you see pretty well exactly what he thought.

And in that same article in the New York Times, they point out that—routine proceedings Monday Judge Henley said he received a written statement from the five men dated November 4 saying they plan to stop filing legal motions and to announce our confessions to plea in full. The thing is that was in 2008, and so for about 2½ years, we have delayed justice as a result of the President and Attorney General promising show trials. They backed off of that.

And, Mr. Saltzburg, it is true that most places you can't get the death penalty if you decide to plea guilty and the court accepts the plea. And the prosecution can have something to say about whether that plea is accepted or not. And even if a plea of guilty is not accepted and a plea of not guilty is entered on behalf of the defendant or respondent or detainee, you can still enter into evidence the confession of someone there.

And we have the transcript, and I would like to offer a copy for the record, Mr. Chairman.

Mr. SENSENBRENNER. Without objection.

[The information referred to follows:]

UNCLASSIFIED

Verbatim Transcript of Combatant Status Review Tribunal Hearing for ISN 10024

OPENING

REPORTER: On the record

RECORDER: All rise.

PRESIDENT: Remain seated and come to order. Go ahead, Recorder.

RECORDER: This Tribunal is being conducted at 1328 March 10, 2007 on board U.S. Naval Base Guantanamo Bay, Cuba. The following personnel are present:
 Captain [REDACTED], United States Navy, President
 Lieutenant Colonel [REDACTED], United States Air Force, Member
 Lieutenant Colonel [REDACTED], United States Marine Corps, Member
 Lieutenant Colonel [REDACTED], United States Air Force, Personal Representative
 Language Analysis [REDACTED]
 Gunnery Sergeant [REDACTED], United States Marine Corps, Reporter
 Lieutenant Colonel [REDACTED], United States Army, Recorder
 Captain [REDACTED] is the Judge Advocate member of the Tribunal.

OATH SESSION 1

RECORDER: All Rise.

PRESIDENT: The Recorder will be sworn. Do you, Lieutenant Colonel [REDACTED] solemnly swear that you will faithfully perform the duties as Recorder assigned in this Tribunal so help you God?

RECORDER: I do.

PRESIDENT: The Reporter will now be sworn. The Recorder will administer the oath.

RECORDER: Do you Gunnery Sergeant [DELETED] swear or affirm that you will faithfully discharge your duties as Reporter assigned in this Tribunal so help you God?

REPORTER: I do.

PRESIDENT: The Translator will be sworn.

ISN #10024
 Enclosure (3)
 Page 1 of 26

UNCLASSIFIED

UNCLASSIFIED

RECORDER: Do you swear or affirm that you will faithfully perform the duties of Translator in the case now in hearing so help you God?

TRANSLATOR: I do.

PRESIDENT: We will take a brief recess now in order in to bring Detainee into the room. Recorder note the date and time.

RECORDER: The time is 1:30 pm hours on 10 March 2007. This Tribunal is in now in recess. [The Tribunal recessed at 1330, 10 March 2007. The members withdrew from the hearing room.]

CONVENING AUTHORITY

RECORDER: All Rise.
[The Tribunal reconvened and the members entered the room at 1334, 10 March 2007.]

PRESIDENT: This hearing will come to order. Please be seated.

PRESIDENT: Before we begin, Khalid Sheikh Muhammad, I understand you speak and understand English. Is that correct?

DETAINEE: [Detainee nods his head in affirmative].

PRESIDENT: Alright. Are you comfortable in continuing in English or would you like everything translated in Arabic?

DETAINEE: Everything in English but if I have a problem the linguist will help me.

PRESIDENT: We will proceed in English. If you indicate to me that you would like something translated we will go ahead and do that. Alright?

PRESIDENT: This Tribunal is convened by order of the Director, Combatant Status Review Tribunals under the provisions of his Order of 22 February 2007.

PRESIDENT: This Tribunal will determine whether Khalid Sheikh Muhammad meets the criteria to be designated as an enemy combatant against the United States or its coalition partners or otherwise meets the criteria to be designated as an enemy combatant.

OATH SESSION 2

PRESIDENT: The members of this Tribunal shall now be sworn. All rise.

ISN #10624
Enclosure (3)
Page 2 of 26

UNCLASSIFIED

UNCLASSIFIED

RECORDER: Do you swear or affirm that you will faithfully perform your duties as a member of this Tribunal; that you will impartially examine and inquire into the matter now before you according to your conscience, and the laws and regulations provided; that you will make such findings of fact and conclusions as are supported by the evidence presented; that in determining those facts, you will use your professional knowledge, best judgment, and common sense; and that you will make such findings as are appropriate according to the best of your understanding of the rules, regulations, and laws governing this proceeding, and guided by your concept of justice so help you God?

TRIBUNAL: I do.

PRESIDENT: The Recorder will now administer the oath to the Personal Representative.

RECORDER: Do you swear or affirm that you will faithfully perform the duties of Personal Representative in this Tribunal so help you God?

PERSONAL
REPRESENTATIVE: I do.

PRESIDENT: Please be seated.

PRESIDENT: The Recorder, Reporter, and Translator have previously been sworn.

EXPLANATION OF PROCEEDINGS

PRESIDENT: Khalid Sheikh Muhammad, you are hereby advised that the following applies during this hearing:

PRESIDENT: You may be present at all open sessions of the Tribunal. However, if you become disorderly, you will be removed from the hearing, and the Tribunal will continue to hear evidence in your absence.

PRESIDENT: You may not be compelled to testify at this Tribunal. However, you may testify if you wish to do so. Your testimony can be under oath or unsworn.

PRESIDENT: You may have the assistance of a Personal Representative at the hearing. Your assigned Personal Representative is present.

PRESIDENT: You may present evidence to this Tribunal, including the testimony of witnesses who are reasonably available and whose testimony is relevant to this hearing. You may question witnesses testifying at the Tribunal.

ISN #10024
Enclosure (3)
Page 3 of 26

UNCLASSIFIED

UNCLASSIFIED

PRESIDENT: You may examine documents or statements offered into evidence other than classified information. However, certain documents may be partially masked for security reasons.

PRESIDENT: Khalid Sheikh Muhammad, do you understand this process?

DETAINEE: Yes. If I have question can I ask you?

PRESIDENT: Yes, you may.

DETAINEE: About the testimony which I ask about the witnesses.

PRESIDENT: Yes, I'm going to address the witnesses shortly. So, if you will bear with us I will take that up in a few moments.

DETAINEE: Okay.

PRESIDENT: Do you have any questions concerning the Tribunal process?

DETAINEE: Okay by me.

PRESENTATION OF UNCLASSIFIED INFORMATION

PRESIDENT: Personal Representative, please provide the Tribunal with the Detainee Election Form.

PERSONAL REPRESENTATIVE: I am handing the Tribunal the Detainee Election Form, which was previously marked as Exhibit D-a.

PRESIDENT: Alright, the Tribunal has received Exhibit D-a that indicates the Detainee wants to participate in the Tribunal and wants the assistance of the Personal Representative.

RECORDER PRESENTS UNCLASSIFIED

PRESIDENT: Recorder, please provide the Tribunal with the unclassified evidence.

RECORDER: I am handing the Tribunal what has previously been marked as Exhibit R-1, the unclassified summary of the evidence that relates to this Detainee's status as an enemy combatant. A translated copy of this exhibit was provided to the Personal

ISN #16024
Enclosure (3)
Page 4 of 26

UNCLASSIFIED

UNCLASSIFIED

Representative in advance of this hearing for presentation to the Detainee. In addition, I am handing to the Tribunal the following unclassified exhibits, marked as Exhibit R-2. Copies of these Exhibits have previously been provided to the Personal Representative. [Documents presented to Tribunal]

PRESIDENT: Recorder, please read the unclassified summary of evidence for the record. But before you proceed, Khalid Sheikh Muhammad, let me remind you that you must not comment on this evidence at this time. You will be provided with an opportunity shortly to provide any comments that you would like. Recorder, please proceed.

RECORDER: The following facts support the determination that the Detainee is an enemy combatant:

Paragraph a. On the morning of 11 September 2001, four airliners traveling over the United States were hijacked. The flights hijacked were: American Airlines Flight 11, United Airlines Flight 175, American Airlines Flight 77, and United Airlines Flight 93. At approximately 8:46 a.m., American Airlines Flight 11 crashed into the North Tower of the World Trade Center, resulting in the collapse of the tower at approximately 10:25 a.m. At approximately 9:05 a.m., United Airlines Flight 175 crashed into the South Tower of the World Trade Center, resulting in the collapse of the tower at approximately 9:55 a.m. At approximately 9:37 a.m., American Airlines Flight 77 crashed into the southwest side of the Pentagon in Arlington, Virginia. At approximately 10:03 a.m., United Airlines Flight 93 crashed in Stoney Creek Township, Pennsylvania. These crashes and subsequent damage to the World Trade Center and the Pentagon resulted in the deaths of 2,972 persons in New York, Virginia, and Pennsylvania.

Paragraph b. The Detainee served as the head of the al Qaida military committee and was Usama bin Laden's principal al Qaida operative who directed the 11 September 2001 attacks in the United States.

Paragraph c. In an interview with an al Jazeera reporter in June 2002, the Detainee stated he was the head of the al Qaida military committee.

Paragraph d. A computer hard drive seized during the capture of the Detainee contained information about the four airplanes hijacked on 11 September 2001 including code names, airline company, flight number, target, pilot name and background information, and names of the hijackers.

Paragraph e. A computer hard drive seized during the capture of the Detainee contained photographs of 19 individuals identified as the 11 September 2001 hijackers.

ISN #10024
Enclosure (3)
Page 5 of 26

UNCLASSIFIED

UNCLASSIFIED

Paragraph f. A computer hard drive seized during the capture of the Detainee contained a document that listed the pilot license fees for Mohammad Atta and biographies for some of the 11 September 2001 hijackers.

Paragraph g. A computer hard drive seized during the capture of the Detainee contained images of passports and an image of Mohammad Atta.

Paragraph h. A computer hard drive seized during the capture of the Detainee contained transcripts of chat sessions belonging to at least one of the 11 September 2001 hijackers.

Paragraph i. The Detainee directed an individual to travel to the United States to case targets for a second wave of attacks.

Paragraph j. A computer hard drive seized during the capture of the Detainee contained three letters from Usama bin Laden.

Paragraph k. A computer hard drive seized during the capture of the Detainee contained spreadsheets that describe money assistance to families of known al Qaida members.

Paragraph l. The Detainee's name was on a list in a computer seized in connection with a threat to United States airlines, United States embassies and the Pope.

Paragraph m. The Detainee wrote the *bojinka plot*, the airline bomb plot which was later found on his nephew Ramzi Yousef's computer.

Paragraph n. The *bojinka plot* is also known as the Manila air investigation.

Paragraph o. The Manila air investigation uncovered the Detainee conspired with others to plant explosive devices aboard American jetliners while those aircraft were scheduled to be airborne and loaded with passengers on their way to the United States.

Paragraph p. The Detainee was in charge of and funded an attack against United States military vessels heading to the port of Djibouti.

Paragraph q. A computer hard drive seized during the capture of the Detainee contained a letter to the United Arab Emirates threatening attack if their government continued to help the United States.

Paragraph r. During the capture of the Detainee, information used exclusively by al Qaida operational managers to communicate with operatives was found.

Paragraph s. The Detainee received funds from Kuwaiti-based Islamic extremist groups and delivered the funds to al Qaida members.

ISN #10024
Enclosure (3)
Page 6 of 26

UNCLASSIFIED

UNCLASSIFIED

Paragraph t. A computer hard drive seized during the capture of the Detainee contained a document that summarized operational procedures and training requirements of an al Qaida cell.

Paragraph u. A computer hard drive seized during the capture of the Detainee contained a list of killed and wounded al Qaida martyrs.

And lastly, Paragraph v. Passport photographs of al Qaida operatives were seized during the capture of the Detainee.

RECORDER: Sir, this concludes the summary of unclassified evidence.

PRESIDENT: Very well.

PRESIDENT: Personal Representative, does the Detainee have any evidence to present to this Tribunal?

PERSONAL

REPRESENTATIVE: Yes, sir. I am handing to the Tribunal the following unclassified exhibits marked as Exhibits D-b through D-d. Copies of these exhibits have been previously provided to the Recorder. [Documents presented to Tribunal]

PRESIDENT: Exhibit D-b appears to be a statement that the Detainee has provided.

PERSONAL

REPRESENTATIVE: Yes, Sir.

PRESIDENT: Alright. And Exhibit D-c contains hand written notes that appear to be Arabic and English as well as the typed version of that. Is that correct?

PERSONAL

REPRESENTATIVE: Yes, Sir.

PRESIDENT: Alright. And D-d is a written statement regarding alleged abuse or treatment that the Detainee received.

PERSONAL

REPRESENTATIVE: Yes, Sir.

PRESIDENT: Alright. We will go into those shortly.

ISN #10024
Enclosure (3)
Page 7 of 26

UNCLASSIFIED

UNCLASSIFIED

PRESIDENT: Khalid Sheikh Muhammad, you may now make an oral statement to the Tribunal, and you have the assistance of your Personal Representative in doing so. Do you wish to make an oral statement to this Tribunal?

DETAINEE: He will start, the Personal Representative; PR will read then later I will comment.

PRESIDENT: Very well, you may proceed.

RECORDER: Sir, would you hold one moment?

PRESIDENT: Yes.

RECORDER: Ah, before the Detainee makes a statement, ah, I'd like to ah.

PRESIDENT: Question of the oath?

RECORDER: Ah, no sir.

RECORDER: Concerning classified evidence.

PRESIDENT: Very well.

PRESIDENT: Do you have any further evidence to present at this time, Recorder?

RECORDER: Mr. President, I have no further unclassified evidence for the Tribunal but I respectfully request a closed Tribunal session at an appropriate time to present classified evidence relevant to this Detainee's status as an enemy combatant.

PRESIDENT: Very well, your request for a closed session is granted and will be taken up in due course.

PRESIDENT: You may proceed, PR.

PERSONAL

REPRESENTATIVE: The Detainee responds to the unclassified summary of evidence with the following key points.

PERSONAL

REPRESENTATIVE: "Some paragraphs under paragraph number 3, lead sentence are not related to the context or meaning of the aforementioned lead sentence. For example, paragraph 3-a is only information from news or a historical account of events on 11 September 2001, and note with no specific linkage being made in this

ISN #10024
Enclosure (3)
Page 8 of 26

UNCLASSIFIED

UNCLASSIFIED

paragraph to me or the definition of Enemy Combatant. As another example, sub-paragraph 3-n makes no linkage to me or to the definition of Enemy Combatant."

DETAINEE: Are they following along?

PERSONAL

REPRESENTATIVE: Ah, they they have that in front of them for reference.

PRESIDENT: Yes.

DETAINEE: Okay.

PERSONAL

REPRESENTATIVE: Second main point; "There are two false statements in the Summary of Evidence. Sub-paragraph 3-c is false. I never stated to the Al Jazeera reporter that I was the head of the al Qaida military committee. Also, sub-paragraph 3-s is false. I did not receive any funds from Kuwait."

PERSONAL

REPRESENTATIVE: Point number 3. "There is an unfair 'stacking of evidence' in the way the Summary of Evidence is structured. In other words, there are several sub-paragraphs under parent-paragraph 3 which should be combined into one sub-paragraph to avoid creating the false perception that there are more allegations or statements against me specifically than there actually are. For example, sub-paragraphs 3-m through 3-o, which pertain to the *bojinka* plot should be combined into one paragraph, as should paragraphs 3-a through 3-h, which pertain to 9/11."

PERSONAL

REPRESENTATIVE: Lastly, my name is misspelled in the Summary of Evidence. It should be S-h-a-i-k-h or S-h-e-i-k-h, but not S-h-a-y-k-h, as it is in the subject line.

PRESIDENT: Would you like to add anything to that, Khalid Sheikh Muhammad ?

PERSONAL

REPRESENTATIVE: Final statement.

DETAINEE: No, I just want to ask about witnesses.

PRESIDENT: Okay, ah, let's finish with these then I will get to the witnesses.

ISN #10024
Enclosure (3)
Page 9 of 26

UNCLASSIFIED

UNCLASSIFIED

DETAINEE: Okay.

PRESIDENT: Try to keep it in order.

PRESIDENT: You want to continue, PR? Do you have another statement?

PERSONAL

REPRESENTATIVE: That concludes this Detainee's response to the, ah, unclassified summary of evidence, sir.

PRESIDENT: Oh.

CALLING OF WITNESSES

PRESIDENT: We will now allow for the calling of witnesses. All witnesses called before this Tribunal may be questioned by the Detainee if present, the Personal Representative, the Recorder, and the Tribunal Members.

PRESIDENT: Does the Recorder have any witnesses to present?

RECORDER: No, sir.

PRESIDENT: Alright.

PRESIDENT: From the Detainee Election Form and I was informed earlier that the Detainee requested the presence of two witnesses to testify here today. Ramzi bin al-Shibh and Mustafa Hawsawi. The Detainee believes the witnesses can provide testimony related to the Detainee's actions specified in the unclassified summary of the evidence.

PRESIDENT: I have had the opportunity to review the request for witnesses and I have made some findings and I'm going to place them on the record now and when I conclude that, Khalid Sheikh Muhammad, you may respond to that if you'd like.

PRESIDENT: First the request for Ramzi bin al-Shibh, the proffer of the testimony from the Detainee was that Ramzi is alleged to have been present during the al Jazeera interview in June 2002 during which it is said the Detainee claimed to be head of al Qaida Military Committee. The Detainee claims he never stated that, to be the head of the Military Committee, during the interview and states that Ramzi, if called, can confirm this.

PRESIDENT: This witness is not relevant in the President's view for the following reasons. In the totality of the circumstances and given the nature and quality of the other unclassified evidence, the Detainee's alleged statements as reported in al Jazeera

ISN #10024
Enclosure (3)
Page 10 of 26

UNCLASSIFIED

UNCLASSIFIED

are of limited value and negligible relevancy to the issue of combatant status. As such, any corroboration or contradiction by the proffered witness is not relevant. The creditability determinations with regard to R-2, which is the al Jazeera article, can be made by the Tribunal without the proffered testimony. As such, the Detainee's request for the production of that witness is denied.

PRESIDENT: As to the request for Mustafa Hawsawi, ah, it is proffered that Hawsawi, if called, could testify that the computer/hard drive referenced in the unclassified summary was not this Detainee's property and that the place of the Detainee's capture was not the house of the Detainee. In the President's view this testimony is not relevant to the issues regarding the Detainee's capture or his combatant status for the following reasons.

PRESIDENT: Whether the Detainee had actual legal title or ownership of the computer/hard drive or the house where the capture took place is irrelevant to the determination of the Detainee's status as an enemy combatant. Based on the proffer, if true, Hawsawi's testimony will not provide relevant information. The issue of ownership, while of some interest, is not relevant to status. What is relevant is possession, usage, connection and presence. Hawsawi's testimony will not speak to any relevant information in regard to such points. As such, the request for the production of that witness is denied.

PRESIDENT: If you would like to respond to that, I'll hear you.

DETAINEE: Most of these facts which be written are related to this hard drive. And more than eleven of these facts are related to this computer. Other things are which is very old even nobody can bring any witnesses for that as you written here if it will be ah a value for you for the witness near by you will do it. This computer is not for me. Is for Hawsawi himself. So I'm saying I need Hawsawi because me and him we both been arrested day. Same way. So this computer is from him long time. And also the problem we are not in court and we are not judge and he is not my lawyer but the procedure has been written reported and the way has mostly as certain charged against me; tell him, [Arabic Phrase].

TRANSLATOR: [Translating] They are only accusations.

DETAINEE: So accusations. And the accusations, they are as you put for yourself ah definition for enemy combatant there are also many definitions for that accusation of fact or charges that has been written for any ah. [Arabic Phrase]

TRANSLATOR: [Translating] Person is accused.

ISN #10024
Enclosure (3)
Page 11 of 26

UNCLASSIFIED

UNCLASSIFIED

DETAINEE: So, if I been accused then if you want to put facts against me also the definition for these facts. If you now read number N now what is written the *bojinka* plot. Is known many lead investigation it is not related to anything facts to be against me. So when I said computer hard drive/ hard disk, same thing. All these point only one witness he can say yes or not cause he is this computer is under his possession him computer. And also specifically if he said Mohammad Atta picture been this hard drive. I don't think this should accepted. There are many 100 thousand Americans who have a lot of picture on their computer. You cannot say I find Muhammad Atta on your computer then you use this fact against you. Or you find any files in your computer to be what about it's mine, it's not my computer. If this witness, he will state that this known and here that has been ninety percent of what is written is wrong. And for Ramzi, for reporter in Jazeera, he claimed that I state this one and you know the media man. How they are fashionable. What they mean in their own way in a whole different way. They just wrote it so he say I state. But I never stated and I don't have any witnesses and witness are available here at Guantanamo. He is Detainee. He was with me. Which he been mostly in all my interview with him. Me and them, there was three person, me and Ramzi and this reporter. So if you not believe me, not believe him, believe my witness Ramzi. Then he's what he state the reporter most is false. I not denying that I'm not an enemy combatant about this war but I'm denying the report. It not being written in the proper way. Which is really facts and mostly just being gathered many information. General information that form in way of doing, to use in facts against me.

PRESIDENT: I have heard and understood your argument. In order for me to make my determinations regarding the production of witnesses I first have to believe that they are relevant for the reasons that I have stated. For the reasons I have stated, I do not believe they are relevant. Whether or not they may be available here on Guantanamo, is a second decision to be made, but only if I decide they are relevant. I have heard your arguments. I noted them. However, my ruling stands.

PRESIDENT: The Recorder has no witnesses, is that my understanding?

RECORDER: No, sir.

PRESIDENT: And there are no other approved witnesses to taken up. Ah, we will take a brief moment to review the unclassified evidence that we received so far and then we will pick back up in the proceeding.

MEMBER: If I might ask a question real quick of the PR. This is the entire translation of the hand written notes?

ISN#10024
 Enclosure (3)
 Page 12 of 26

UNCLASSIFIED

UNCLASSIFIED

PERSONAL

REPRESENTATIVE: Yeah. The hand written notes are the Detainee is on yellow.

MEMBER: Yes.

PERSONAL

REPRESENTATIVE: and, then the next set of notes, hand written notes, are the Linguist's translation and then the final hard copy printed that's, ah, that...

MEMBER: Type written.

PERSONAL

REPRESENTATIVE: Typed from Linguist's notes.

MEMBER: Type from Linguist's translations. Okay.

PRESIDENT: Khalid Sheikh Muhammad, I did not offer you an oath early because I was informed by the Personal Representative that you would be making some statement later on in these proceedings relevant to the truthfulness of your comments. So, if you would like to take an oath I would administer one to you but I did understand that you going to make a statement.

DETAINEE: In the final statement, I will explain why then.

PRESIDENT: Alright. Thank you. [Tribunal pauses to review D-a thru D-d]

MEMBER: Seen those.

TRANSLATOR: Sir.

PRESIDENT: Yes.

TRANSLATOR: He wanted me to translate a Koranic verse on the spot.

PRESIDENT: I will permit it.

TRANSLATOR: Thank you.

TRANSLATOR: Can I ask him for clarification?

PRESIDENT: Yes.

PRESIDENT: Do you need a few more moments, Translator?

ISN #10024
Enclosure (3)
Page 13 of 26

UNCLASSIFIED

UNCLASSIFIED

TRANSLATOR: Yes, sir, about thirty seconds.

PRESIDENT: Go ahead and take your time.

TRANSLATOR: Would you me to read the English translation after he read Arabic verse or would like him to read it.

PRESIDENT: You want to save that for later?

TRANSLATOR: [Nods head]

PRESIDENT: Alright.

PRESIDENT: Let me take up a few things that have come up as based on my review of these documents that have been provided to us so far. D-d, appears to be a written statement regarding certain treatment that you claim to have received at the hands of agents of the United States government as you indicated from the time of your capture in 2003 up until before coming here to Guantanamo in September 2006.

PRESIDENT: Is that correct?

DETAINEE: Yes.

PRESIDENT: Alright.

PRESIDENT: Now, I haven't seen any statements in the evidence we receive so far that claim to come from you other than acknowledging whether you were or not the head of the Military Committee. Were any statements that you made as the result of any of the treatment that you received during that time frame from 2003 to 2006? Did you make those statements because of the treatment you receive from these people?

DETAINEE: Statement for whom?

PRESIDENT: To any of these interrogators.

DETAINEE: CIA peoples. Yes. At the beginning when they transferred me {REDACTED}.

PRESIDENT: What I'm trying to get at is any statement that you made was it because of this treatment, to use your word, you claim torture. Do you make any statements because of that?

TRANSLATOR: Sir, for clarification.

ISN #16624
Enclosure (3)
Page 14 of 26

UNCLASSIFIED

UNCLASSIFIED

PRESIDENT: Can you translate it?

TRANSLATOR: I will translate in Arabic.

PRESIDENT: Yes.

TRANSLATOR: [Translating above]

DETAINEE: I ah cannot remember now [REDACTED] I'm senior man. Many people they know me which I don't them. I ask him even if he knew George Bush. He said, yes I do. He don't know you that not means its false. [REDACTED]. I said yes or not. This I said.

PRESIDENT: Alright, I understand.

PRESIDENT: Is there anything you would like to correct, amend, modify or explain to us from what you said back then?

DETAINEE: I want to just it is not related enemy combatant but I'm saying for you to be careful with people. That you have classified and unclassified facts. My opinion to be fair with people. Because when I say, I will not regret when I say I'm enemy combatant. I did or not I know there are other but there are many Detainees which you receive classified against them maybe, maybe not take away from me for many Detainees false witnesses. This only advice.

PRESIDENT: So you are aware that other...

DETAINEE: Yes.

PRESIDENT: People made false statement as a result of this?

DETAINEE: I did also.

PRESIDENT: Uh huh.

DETAINEE: I told him, I know him yes. There are and they are. Not even you show me. This I don't know him I never met him at all. So, unclassified which is both classified and unclassified so this is you know him you don't know him. You have to be fair with people. There are many many people which they have never been part of the Taliban. Afghanistan there have been many people arrested for example people who have been arrested after October 2001 after make attack against Afghanistan many of them just arrive after they don't what has happen. When Russian came to Afghanistan they felt they went back but they did anything with Taliban and al Qaida then came after that. I don't know why it was younger

ISN #10624
 Enclosure (3)
 Page 15 of 26

UNCLASSIFIED

UNCLASSIFIED

people same thing for Afghanis people they show Afghanis people. I will give example one. His name is Sayed Habib. This I remember. [REDACTED]

PRESIDENT: Alright.

PRESIDENT: Now what.

DETAINEE: For me nothing which was recorded. For which is written here is not related

PRESIDENT: I understand.

PRESIDENT: I do note that in one of the exhibits you indicate you are not under any pressure or duress today. Is that correct?

DETAINEE: That is about I'm hearing today. Yes.

PRESIDENT: So anything.

DETAINEE: Some of this information, I not state it to them.

PRESIDENT: The information that you are telling us today, so we are clear. You do not believe you are under any pressure or threat or duress to speak to us today, is that correct?

DETAINEE: Yes, that's correct.

PRESIDENT: Alright.

PRESIDENT: Now what you have told us about your previous treatment is on the record of these proceeding now and will be reported for any investigation that may be appropriate. Also, we will consider what you have told us in making our determination regarding your enemy combatant status.

DETAINEE: I hope you will take care of other Detainees with what I said. It's up to you.

PRESIDENT: I will do as I've said. I'll see to it that it is reported.

PRESIDENT: Alright. At this point, we are going to go into the final statement but I do want to give the opportunity to the Recorder, PR, and Tribunal member to ask questions if they would like. So, what will do is proceed then to the Detainee's final statement and then I'll have a question and answer session following that. Alright just give me a moment.

PRESIDENT: Alright.

ISN #10024
Enclosure (3)
Page 16 of 26

UNCLASSIFIED

UNCLASSIFIED

PRESIDENT: Khalid Sheikh Muhammad, this concludes the presentation of unclassified information to the Tribunal. We are about to conclude the unclassified portion of the hearing. Do you wish to now make any final statement to the Tribunal? You have the assistance of your PR.

DETAINEE: I make a two part. Maybe he will read then I will go also.

PRESIDENT: Very well. You may continue.

PERSONAL

REPRESENTATIVE: Mr. President, the Detainee has asked me to read his final statement to the Tribunal with the understanding he may interject or add statements if he needs to, to correct what I say. According to the Detainee:

"I hereby admit and affirm without duress to the following:

1. I swore Bay'at (i.e., allegiance) to Sheikh Usama Bin Laden to conduct Jihad of self and money, and also Hijrah (i.e., expatriation to any location in the world where Jihad is required).
2. I was a member of the Al Qaida Council.
3. I was the Media Operations Director for Al-Sahab, or 'The Clouds,' under Dr. Ayman Al-Zawahiri. Al-Sahab is the media outlet that provided Al-Qaida-sponsored information to Al Jazeera. Four."

DETAINEE: [speaking inaudibly to Personal Representative]

PRESIDENT: Please tell.

PERSONAL

REPRESENTATIVE: In other channels or other media outlets.

PRESIDENT: Thank you.

PERSONAL

REPRESENTATIVE: [continuing] "4. I was the Operational Director for Sheikh Usama Bin Laden for the organizing, planning, follow-up, and execution of the 9/11 Operation under the Military Commander, Sheikh Abu Hafs Al-Masri Subhi Abu Sittah.

5. I was the Military Operational Commander for all foreign operations around the world under the direction of Sheikh Usama Bin Laden and Dr. Ayman Al-Zawahiri.
6. I was directly in charge, after the death of Sheikh Abu Hafs Al-Masri Subhi Abu Sittah, of managing and following up on the Cell for the Production of Biological Weapons, such as anthrax and others, and following up on Dirty Bomb Operations on American soil.
7. I was Emir (i.e., commander) of Beit Al Shuhada (i.e., the Martyrs' House) in the state of Kandahar, Afghanistan, which housed the 9/11 hijackers. There I was responsible for their

ISN #10024
Enclosure (3)
Page 17 of 26

UNCLASSIFIED

UNCLASSIFIED

training and readiness for the execution of the 9/11 Operation. Also, I hereby admit and affirm without duress that I was a responsible participant, principal planner, trainer, financier (via the Military Council Treasury), executor, and/or a personal participant in the following:

1. I was responsible for the 1993 World Trade Center Operation.
2. I was responsible for the 9/11 Operation, from A to Z.
3. I decapitated with my blessed right hand the head of the American Jew, Daniel Pearl, in the city of Karachi, Pakistan. For those who would like to confirm, there are pictures of me on the Internet holding his head.
4. I was responsible for the Shoe Bomber Operation to down two American airplanes.
5. I was responsible for the Filka Island Operation in Kuwait that killed two American soldiers.
6. I was responsible for the bombing of a nightclub in Bali, Indonesia, which was frequented by British and Australian nationals.
7. I was responsible for planning, training, surveying, and financing the New (or Second) Wave attacks against the following skyscrapers after 9/11:
 - a. Library Tower, California.
 - b. Sears Tower, Chicago,
 - c. Plaza Bank, Washington state.
 - d. The Empire State Building, New York City.
8. I was responsible for planning, financing, & follow-up of Operations to destroy American military vessels and oil tankers in the Straights of Hormuz, the Straights of Gibraltar, and the Port of Singapore.
9. I was responsible for planning, training, surveying, and financing for the Operation to bomb and destroy the Panama Canal.
10. I was responsible for surveying and financing for the assassination of several former American Presidents, including President Carter.
11. I was responsible for surveying, planning, and financing for the bombing of suspension bridges in New York.
12. I was responsible for planning to destroy the Sears Tower by burning a few fuel or oil tanker trucks beneath it or around it.
13. I was responsible for planning, surveying, and financing for the operation to destroy Heathrow Airport, the Canary Wharf Building, and Big Ben on British soil.
14. I was responsible for planning, surveying, and financing for the destruction of many night clubs frequented by American and British citizens on Thailand soil.
15. I was responsible for surveying and financing for the destruction of the New York Stock Exchange and other financial targets after 9/11.
16. I was responsible for planning, financing, and surveying for the destruction of buildings in the Israeli city of Elat by using airplanes leaving from Saudi Arabia.
17. I was responsible for planning, surveying, and financing for the destruction of American embassies in Indonesia, Australia, and Japan.

ISN #10024
 Enclosure (3)
 Page 18 of 26

UNCLASSIFIED

UNCLASSIFIED

18. I was responsible for surveying and financing for the destruction of the Israeli embassy in India, Azerbaijan, the Philippines, and Australia.
19. I was responsible for surveying and financing for the destruction of an Israeli 'El-Al' Airlines flight on Thailand soil departing from Bangkok Airport.
20. I was responsible for sending several Mujahadeen into Israel to conduct surveillance to hit several strategic targets deep in Israel.
21. I was responsible for the bombing of the hotel in Mombasa that is frequented by Jewish travelers via El-Al airlines.
22. I was responsible for launching a Russian-made SA-7 surface-to-air missile on El-Al or other Jewish airliner departing from Mombasa.
23. I was responsible for planning and surveying to hit American targets in South Korea, such as American military bases and a few night clubs frequented by American soldiers.
24. I was responsible for financial, excuse me, I was responsible for providing financial support to hit American, Jewish, and British targets in Turkey.
25. I was responsible for surveillance needed to hit nuclear power plants that generate electricity in several U.S. states.
26. I was responsible for planning, surveying, and financing to hit NATO Headquarters in Europe.
27. I was responsible for the planning and surveying needed to execute the Bojinka Operation, which was designed to down twelve American airplanes full of passengers. I personally monitored a round-trip, Manila-to-Seoul, Pan Am flight.
28. I was responsible for the assassination attempt against President Clinton during his visit to the Philippines in 1994 or 1995.
29. I was responsible for the assassination attempt against Pope John Paul the second while he was visiting the Philippines."

DETAINEE: I was not responsible, but share.

PERSONAL

REPRESENTATIVE: I shared responsibility. I will restate number twenty nine.

29. "I shared responsibility for the assassination attempt against Pope John Paul the second while he was visiting the Philippines.
30. I was responsible for the training and financing for the assassination of Pakistan's President Musharaf.
31. I was responsible for the attempt to destroy an American oil company owned by the Jewish former Secretary of State, Henry Kissinger, on the Island of Sumatra, Indonesia."

ISN #10024
Enclosure (3)
Page 19 of 26

UNCLASSIFIED

UNCLASSIFIED

PERSONAL

REPRESENTATIVE: Sir, that concludes the written portion of the Detainee's final statement and as he has alluded to earlier he has some additional comments he would like to make.

PRESIDENT: Alright. Before you proceed, Khalid Sheikh Muhammad, the statement that was just read by the Personal Representative, were those your words?

BEGIN DETAINEE ORAL STATEMENT

DETAINEE: Yes. And I want to add some of this one just for some verification. It like some operations before I join al Qaida. Before I remember al Qaida which is related to *Bajinka Operation* I went to destination involve to us in 94, 95. Some Operations which means out of al Qaida. It's like beheading Daniel Pearl. It's not related to al Qaida. It was shared in Pakistani. Other group, Mujahadeen. The story of Daniel Pearl, because he stated for the Pakistanis, group that he was working with the both. His mission was in Pakistan to track about Richard Reed trip to Israel. Richard Reed, do you have trip? You send it Israel to make set for targets in Israel. His mission in Pakistan from Israeli intelligence, Mosad, to make interview to ask about when he was there. Also, he mention to them he was both. He have relation with CIA people and were the Mosad. But he was not related to al Qaida at all or UBL. It is related to the Pakistan Mujahadeen group. Other operations mostly are some word I'm not accurate in saying. I'm responsible but if you read the heading history. The line there [Indicating to Personal Representative a place or Exhibit D-c].

PERSONAL

REPRESENTATIVE: [Reading] "Also, hereby admit and affirm without duress that I was a responsible participant, principle planner, trainer, financier."

DETAINEE: For this is not necessary as I responsible, responsible. But with in these things responsible participant in finances.

PRESIDENT: I understand. I want to be clear, though, is you that were the author of that document.

DETAINEE: That's right.

PRESIDENT: That it is true?

DETAINEE: That's true.

PRESIDENT: Alright. You may continue with your statement.

DETAINEE: Okay. I start in Arabic.

ISN #10024
Enclosure (3)
Page 20 of 26

UNCLASSIFIED

UNCLASSIFIED

PRESIDENT: Please.

DETAINEE

(through translator): In the name of God the most compassionate, the most merciful, and if any fail to retaliation by way of charity and. I apologize. I will start again. And if any fail to judge by the light of Allah has revealed, they are no better than wrong doers, unbelievers, and the unjust.

DETAINEE: For this verse, I not take the oath. Take an oath is a part of your Tribunal and I'll not accept it. To be or accept the Tribunal as to be, I'll accept it. That I'm accepting American constitution, American law or whatever you are doing here. This is why religiously I cannot accept anything you do. Just to explain for this one, does not mean I'm not saying that I'm lying. When I not take oath does not mean I'm lying. You know very well peoples take oath and they will lie. You know the President he did this before he just makes his oath and he lied. So sometimes when I'm not making oath does not mean I'm lying.

PRESIDENT: I understand.

DETAINEE: Second thing. When I wrote this thing, I mean, the PR he told me that President may stop you at anytime and he don't like big mouth nor you to talk too much. To be within subject. So, I will try to be within the enemy combatant subject

PRESIDENT: You can say whatever you'd like to say so long as it's relevant to what we are discussing here today.

DETAINEE: Okay, thanks.

DETAINEE: What I wrote here, is not I'm making myself hero, when I said I was responsible for this or that. But you are military man. You know very well there are language for any war. So, there are, we are when I admitting these things I'm not saying I'm not did it. I did it but this the language of any war. If America they want to invade Iraq they will not send for Saddam roses or kisses they send for a bombardment. This is the best way if I want. If I'm fighting for anybody admit to them I'm American enemies. For sure, I'm American enemies. Usama bin Laden, he did his best press conference in American media. Mr. John Miller he been there when he made declaration against Jihad, against America. And he said it is not no need for me now to make explanation of what he said but mostly he said about American military presence in Arabian peninsula and aiding Israel and many things. So when we made any war against America we are jackals fighting in the nights. I consider myself, for what you are doing, a religious thing as you

ISN #10024
Enclosure (3)
Page 21 of 26

UNCLASSIFIED

UNCLASSIFIED

consider us fundamentalist. So, we derive from religious leading that we consider we and George Washington doing same thing. As consider George Washington as hero. Muslims many of them are considering Usama bin Laden. He is doing same thing. He is just fighting. He needs his independence. Even we think that, or not me only. Many Muslims, that al Qaida or Taliban they are doing. They have been oppressed by America. This is the feeling of the prophet. So when we say we are enemy combatant, that right. We are. But I'm asking you again to be fair with many Detainees which are not enemy combatant. Because many of them have been unjustly arrested. Many, not one or two or three. Cause the definition you which wrote even from my view it is not fair. Because if I was in the first Jihad times Russia. So I have to be Russian enemy. But America supported me in this because I'm their alliances when I was fighting Russia. Same job I'm doing. I'm fighting. I was fighting there Russia now I'm fighting America. So, many people who been in Afghanistan never live. Afghanistan stay in but they not share Taliban or al Qaida. They been Russian time and they cannot go back to their home with their corrupted government. They stayed there and when America invaded Afghanistan parliament. They had been arrest. They never have been with Taliban or the others. So many people consider them as enemy but they are not. Because definitions are very wide definition so people they came after October of 2002, 2001. When America invaded Afghanistan, they just arrive in Afghanistan cause the hear there enemy. They don't know what it means al Qaida or Usama bin Laden or Taliban. They don't care about these things. They heard they were enemy in Afghanistan they just arrived. As they heard first time Russian invade Afghanistan. They arrive they fought when back than they came. They don't know what's going on and Taliban they been head of government. You consider me even Taliban even the president of whole government. Many people they join Taliban because they are the government. When Karzai they came they join Karzai when come they join whatever public they don't know what is going on. So, many Taliban fight even the be fighters because they just because public. The government is Taliban then until now CIA don't have exactly definition well who is Taliban, who is al Qaida. Your Tribunal now are discussing he is enemy or not and that is one of your jobs. So this is why you find many Afghanis people, Pakistanis people even, they don't know what going on they just hear they are fighting and they help Muslim in Afghanistan. Then what. There are some infidels which they came here and they have to help them. But then there weren't any intend to do anything against America. Taliban themselves between Taliban they said Afghanistan which they never again against 9/11 operation. The rejection between senior of Taliban of what al Qaida are doing. Many of Taliban rejected what they are doing. Even many Taliban, they not agree about why we are in Afghanistan. Some of them they have been with us. Taliban never in their life at all before America invade them the intend to do anything against America. They never been with al Qaida. Does not mean we are

ISN #10024
 Enclosure (3)
 Page 22 of 26

UNCLASSIFIED

UNCLASSIFIED

here as American now. They gave political asylum for many countries. They gave for Chinese oppositions or a North Korean but that does not mean they are with them same thing many of Taliban. They harbor us as al Qaida does not mean we are together. So, this is why I'm asking you to be fair with Afghanis and Pakistanis and many Arabs which been in Afghanistan. Many of them been unjustly. The funny story they been Sunni government they sent some spies to assassinate UBL then we arrested them sent them to Afghanistan/Taliban. Taliban put them into prison. Americans they came and arrest them as enemy combatant. They brought them here. So, even if they are my enemy but not fair to be there with me. This is what I'm saying. The way of the war, you know, very well, any country waging war against their enemy the language of the war are killing. If man and woman they be together as a marriage that is up to the kids, children. But if you and me, two nations, will be together in war the others are victims. This is the way of the language. You know 40 million people were killed in World War One. Ten million kill in World War. You know that two million four hundred thousand be killed in the Korean War. So this language of the war. Any people who, when Usama bin Laden say I'm waging war because such such reason, now he declared it. But when you said I'm terrorist, I think it is deceiving peoples. Terrorists, enemy combatant. All these definitions as CIA you can make whatever you want. Now, you told me when I ask about the witnesses, I'm not convinced that this related to the matter. It is up to you. Maybe I'm convinced but your are head and he [gesturing to Personal Representative] is not responsible, the other, because your are head of the committee. So, finally it's your war but the problem is no definitions of many words. It would be widely definite that many people be oppressed. Because war, for sure, there will be victims. When I said I'm not happy that three thousand been killed in America. I feel sorry even. I don't like to kill children and the kids. Never Islam are, give me green light to kill peoples. Killing, as in the Christianity, Jews, and Islam, are prohibited. But there are exception of rule when you are killing people in Iraq. You said we have to do it. We don't like Saddam. But this is the way to deal with Saddam. Same thing you are saying. Same language you use, I use. When you are invading two-thirds of Mexican, you call your war manifest destiny. It up to you to call it what you want. But other side are calling you oppressors. If now George Washington. If now we were living in the Revolutionary War and George Washington he being arrested through Britain. For sure he, they would consider him enemy combatant. But American they consider him as hero. This right the any Revolutionary War they will be as George Washington or Britain. So we are considered American Army bases which we have from seventies in Iraq. Also, in the Saudi Arabian, Kuwait, Qatar, and Bahrain. This is kind of invasion, but I'm not here to convince you. Is not or not but mostly speech is ask you to be fair with people. I'm don't have anything to say that I'm not enemy. This is why the language of any war in the

ISN #10024
 Enclosure (3)
 Page 23 of 26

UNCLASSIFIED

UNCLASSIFIED

world is killing. I mean the language of the war is victims. I don't like to kill people. I feel very sorry they been killed kids in 9/11. What I will do? This is the language. Sometime I want to make great awakening between American to stop foreign policy in our land. I know American people are torturing us from seventies. [REDACTED] I know they talking about human rights. And I know it is against American Constitution, against American laws. But they said every law, they have exceptions, this is your bad luck you been part of the exception of our laws. They got have something to convince me but we are doing same language. But we are saying we have Sharia law, but we have Koran. What is enemy combatant in my language?

DETAINEE

(through translator): Allah forbids you not with regards to those who fight you not for your faith nor drive you out of your homes from dealing kindly and justly with them. For Allah love those who are just. There is one more sentence. Allah only forbids you with regards to those who fight you for your faith and drive you out of your homes and support others in driving you out from turning to them for friendship and protection. It is such as turn to them in these circumstances that do wrong.

DETAINEE:

So we are driving from whatever deed we do we ask about Koran or Hadith. We are not making up for us laws. When we need Fatwa from the religious we have to go back to see what they said scholar. To see what they said yes or not. Killing is prohibited in all what you call the people of the book, Jews, Judaism, Christianity, and Islam. You know the Ten Commandments very well. The Ten Commandments are shared between all of us. We all are serving one God. Then now kill you know it very well. But war language also we have language for the war. You have to kill. But you have to care if unintentionally or intentionally target if I have if I'm not at the Pentagon. I consider it is okay. If I target now when we target in USA we choose them military target, economical, and political. So, war central victims mostly means economical target. So if now American they know UBL. He is in this house they don't care about his kids and his. They will just bombard it. They will kill all of them and they did it. They kill wife of Dr. Aynan Zawahiri and his two daughters and his son in one bombardment. They receive a report that is his house be. He had not been there. They killed them. They arrested my kids intentionally. They are kids. They been arrested for four months they had been abused. So, for me I have patience. I know I'm not talk about what's come to me. The American have human right. So, enemy combatant itself, it flexible word. So I think God knows that many who been arrested, they been unjustly arrested. Otherwise, military throughout history know very well. They don't war will never stop. War start from Adam when Cain he killed Abel until now. It's never gonna stop killing of people. This is the

ISN #10024
Enclosure (3)
Page 24 of 26

UNCLASSIFIED

UNCLASSIFIED

way of the language. American start the Revolutionary War then they starts the Mexican then Spanish War then World War One, World War Two. You read the history. You know never stopping war. This is life. But if who is enemy combatant and who is not? Finally, I finish statement. I'm asking you to be fair with other people.

PRESIDENT: Does that conclude your statement, Khalid Sheikh Muhammad?

DETAINEE: Yes.

PRESIDENT: Alright.

DETAINEE QUESTION & ANSWER

PRESIDENT: Does the Personal Representative have any questions for the Detainee based on his statement?

PERSONAL
REPRESENTATIVE: No, Sir.

PRESIDENT: Does the Recorder have any questions for the Detainee?

RECORDER: No, Sir.

PRESIDENT: Do either of the Tribunal members wish to question the Detainee?

MEMBERS: No, sir. Nothing further Sir.

PRESIDENT: Alright.

CLOSING UNCLASSIFIED SESSION

PRESIDENT: All unclassified evidence having been provided to the Tribunal, this concludes the open tribunal session.

PRESIDENT: Khalid Sheikh Muhammad, you shall be notified of the Tribunal decision upon completion of the review of these proceed by the Combatant Status Review Tribunal convening authority in Washington, D.C. If, the Tribunal determines that you should not be classified as an enemy combatant, you will be released to your home country as soon as arrangements can be made. If however, the Tribunal determines your classification as an enemy combatant you may be eligible for an Administrative Review Board hearing at a future date.

ISN #10024
Enclosure (3)
Page 25 of 26

UNCLASSIFIED

UNCLASSIFIED

PRESIDENT: The Administrative Review Board will make an assessment of whether there is continued reason to believe that you pose a threat to the United States or its coalition partners in the ongoing armed conflict against terrorist organizations such as al Qaeda and its affiliates and supporters or whether there are other factors bearing upon the need for continued detention.

PRESIDENT: You will have the opportunity to be heard and to present relevant information to the Administrative Review Board. You can present information from your family and friends that might help you at that Board. You are encouraged to contact them as soon as possible to begin to gather information that may help you.

PRESIDENT: A military officer will be assigned at a later date to assist you in the Administrative Review Board process.

ADJOURN OPEN SESSION

PRESIDENT: The open session of this Tribunal hearing is adjourned.

RECORDER: The time is 2:43pm. The date is 10 March 2007.

RECORDER: All Rise.

[The Tribunal withdrew from the hearing room]

AUTHENTICATION

I certify the material contained in this transcript is a true and accurate verbatim rendering of the testimony and English language translation of Detainee's words given during the open session of the Combatant Status Review Tribunal of ISN 10024.

[REDATED]
CAPT JAGC USN
Tribunal President

ISN #10024
Enclosure (3)
Page 26 of 26

UNCLASSIFIED

Mr. GOHMERT. And this is ISN 10024 where Khalid Sheikh Mohammed is questioned by the president of the court, and he goes through his warnings to make sure that he is voluntarily entering the statement and he has a personal representative read it. And I would commend it to anyone who is not familiar with the process. But this is like what we do in a military UCMJ court. Of course, under Article I, Section 8, the Congress has power to constitute tri-

bunals inferior to the Supreme Court. They also have the power to discipline the military.

And so the mistake of the Bush administration was trying to do a military commission or tribunal without Congress. The court set him straight and we got a good bill.

And I do agree, perhaps tongue in cheek, that it was a great improvement in 2009 because that is when we changed the words "enemy combatant" and substituted therefore the words "unprivileged alien enemy belligerent." I am still concerned about using a harsh term. "Enemy" is still in there.

But nonetheless, some of the things Khalid Sheikh Mohammed made very clear that he agreed to was he said I admit and affirm without duress I was a responsible participant, principal planner, trainer, financier via the military council treasury. I was responsible for the 1993 World Trade Center operation, responsible for the 9/11 operation from A to Z. I decapitated with my blessed right hand the head of American Jew Daniel Pearl. I was responsible for the shoe bomber operation to down two American planes. It went on about trying to bring down the library tower, Sears Tower, Plaza Bank, Empire State Building, all the things he goes on to admit freely.

But what gets me is, having served in the military, in the U.S. Army, for 4 years, to hear people come in and say that there are people who are out there to destroy us, they have declared war on us, and they deserve better, some kind of more lavish proceedings than our own military is offensive to me as someone who served in the military. And I don't think that anybody who has declared war on us deserves a more lavish show trial than our military.

And I see my time has expired.

Mr. SENSENBRENNER. The gentleman's time has expired.

The gentleman from Georgia, Mr. Johnson.

Mr. JOHNSON. Thank you, Mr. Chairman.

Mr. Saltzburg, it is a fact, isn't it, that the accused in a military commission can choose to plead guilty. The guilty plea must be accepted, and in so doing, the accused avoids a death penalty.

Mr. SALTZBURG. There is a glitch and uncertainty in the statute. The statute seems to permit a joint statement, a stipulation between the defense and the prosecution that says the defendant did whatever he is charged with, but it is unclear whether or not a defendant whose guilty plea is accepted actually can be sentenced to death under the statute.

Mr. JOHNSON. And it is also true that this case against the 9/11 plotters will rely heavily on charges of conspiracy and material support, and those are not traditionally recognized war crimes. Is that true?

Mr. SALTZBURG. It is true, and the answer, when I was asked what issues might end up coming before an Article III court, they are whether or not those crimes can be tried in a commission, and secondly, with respect to material support, whether there is an ex post facto problem.

Mr. JOHNSON. Well, that is exactly what I was getting to, sir. And so what we have is a situation where KSM was captured back in 2003. It hasn't been 10 years. It has been 6. Captured back in 2003.

And Mr. Stimson, I believe you did a blog last night. You were active on the blog sponsored by The Heritage Foundation, and you stated, quote, the Administration deserves credit for making this decision however late in coming. Correct?

Mr. STIMSON. Yes, sir, I did write that.

Mr. JOHNSON. And you will recall that when KSM was arrested back in 2003, that he was transferred to a secret location in Eastern Europe and then to Guantanamo where he landed in around 2006. Is that true? So from 2003 to 2006, he was in a secret location. Correct? Under U.S. custody.

Mr. STIMSON. He was——

Mr. JOHNSON. Yes or no?

Mr. STIMSON. I don't know where he was, sir.

Mr. JOHNSON. So you don't know where he was during that time.

Mr. STIMSON. No. I know he was at Guantanamo in September 2006.

Mr. JOHNSON. Now, you do know that KSM was waterboarded 183 times.

Mr. STIMSON. I have read that in the newspapers, sir.

Mr. JOHNSON. Now, you also agree that the military commission system was deeply flawed, the one that was produced by the Bush administration, as the Supreme Court pointed out. Correct? Deeply flawed.

Mr. STIMSON. I don't think I have ever used those words. The Supreme Court found that——

Mr. JOHNSON. Okay. well, let's go with "flawed" then. It was flawed. It had to be thrown out and redone. Is that correct?

Mr. STIMSON. That is what the Supreme Court said.

Mr. JOHNSON. So now we are going to take a man who has been waterboarded 183 times, charged with some offenses that have not been recognized as battlefield-type charges, and we are going to use a military commission for the first time to try this high-value detainee. And you don't think there is much risk involved?

Mr. STIMSON. There is no such thing as a risk-free prosecution——

Mr. JOHNSON. Okay. Well, do you think it is better for the Federal prosecutors, the Justice Department to make that decision than it would be for a group of politicians, many of whom have no criminal law experience whatsoever to make the decision?

Mr. STIMSON. Professional prosecutors, including Justice Department lawyers, will make the ultimate decision on the charges to be brought against KSM, including——

Mr. JOHNSON. But you think that it is okay for this group to decide that we want to try this man in——

Mr. SENSENBRENNER. The gentleman's time has expired.

The gentleman from Virginia, Mr. Goodlatte?

Mr. GOODLATTE. Thank you, Mr. Chairman.

Mr. Stimson, speaking of professional politicians making decisions, in November of 2009, in an interview with NBC News, President Obama told a TV audience that critics of the decision to try KSM in civilian court will not find it, quote, offensive at all when he is convicted and when the death penalty is applied to him. As a former Federal prosecutor and as a military judge, do you see any ramifications for the trial of KSM in both military and civilian

court caused by the President of the United States predicting the outcome of the case?

Mr. STIMSON. Of course, I am speaking in my personal capacity, Mr. Goodlatte. But those words are unfortunate and could have legal ramifications in either military commissions or Federal court.

Mr. GOODLATTE. And would this compromise our ability in any way of obtaining the death penalty?

Mr. STIMSON. Anything is possible. I am certain that people involved in the voir dire process of prospective jurors will make inquiry into that.

Mr. GOODLATTE. And is this a problem that would be difficult for a professor of constitutional law, as President Obama once was, to have anticipated?

Mr. STIMSON. Well, again, we all say things we regret, and I am sure the President would like to take that comment back.

Mr. GOODLATTE. Congresswoman Adams had a dialogue with Mr. Saltzburg, and I would like you to comment on that. Professor Saltzburg writes in his testimony that only a handful of cases have been handled by military commissions, and the military commission process has been hampered by starts and stops, changes in the rules, and uncertainty about exactly how cases would proceed. Those are Professor Saltzburg's words in his testimony.

What is the main cause of those starts and stops and changes in the rules that the professor cites? It is directed to you, Mr. Stimson.

Mr. STIMSON. Well, there have been aggressive and, in my opinion, appropriate legal challenges to military commissions, and those challenges have taken a great deal of time.

Mr. GOODLATTE. Let me ask Mr. Beamer. Were you or the other victims' families contacted by the Administration in anticipation of yesterday's announcement?

Mr. BEAMER. Negative.

Mr. GOODLATTE. And how about any of the attorneys on behalf of the conspirators? Have they contacted you?

Mr. BEAMER. No.

Mr. GOODLATTE. Interviewed you in preparation for a defense?

Mr. BEAMER. No.

Mr. GOODLATTE. And, Ms. Hessler, can you tell us, as a constitutional scholar, what problems you think will manifest themselves in proceeding in Article III courts for some terrorists and in military commissions for others? Are we approaching a bifurcated system of rights?

Ms. HESSLER. It certainly seems that way. Eric Holder's statement yesterday made clear that he was very, very reluctant to be transferring this case back to a military commission, and he expressed a commitment to continue Article III courts and he outright criticized Congress for its role in that.

Mr. GOODLATTE. And based on what you have seen from the Administration when it comes to dealing with terrorists, does there appear to be a well thought out system based on constitutional principles or is it a rudderless approach?

Ms. HESSLER. Well, I would say there certainly has been a certain bit of incoherence from the beginning, and even with yester-

day's announcement, there does not seem to be a coherent policy in place.

Mr. GOODLATTE. And has the President, who was a constitutional law professor at one point, ever made any statements about the effectiveness of military commissions?

Ms. HESSLER. He said that the military commissions are fair and he said that they can be a vital tool to protecting national security information.

Mr. GOODLATTE. Mr. Stimson, I saw you nodding your head. Do you have anything to add to that?

Mr. STIMSON. Well, I would direct your attention, Mr. Goodlatte, to his May 21st, 2009 speech at the National Archives, and he commended the use of military commissions for appropriate cases.

Mr. GOODLATTE. And let me ask you about the soundness of that. According to news reports, KSM and his four co-conspirators will be tried together. Does the Military Commissions Act address trials involving multiple defendants?

Mr. STIMSON. It does, sir.

Mr. GOODLATTE. In what way?

Mr. STIMSON. It is allowed.

Mr. GOODLATTE. So you think this is a workable mechanism.

Mr. STIMSON. It is a workable mechanism, just as it would be in Federal court.

Mr. GOODLATTE. Thank you very much.

Thank you, Mr. Chairman.

Mr. SENSENBRENNER. The Chair will recognize himself to conclude the hearing.

You are back. The Chair recognizes the gentlewoman from California, Ms. Chu.

Ms. CHU. Professor Saltzburg, a number of people today have discussed the fact that nearly 10 years have passed since the attack on 9/11. While I agree that the delay in bringing these co-conspirators to justice is unacceptable, I think it is worth understanding what the delay is about. So, Professor Saltzburg, can you help us understand why this has taken so long?

Mr. SALTZBURG. You know, there is a lot of blame that could go around. There has been uncertainty about whether or not to proceed in commissions or in Article III courts, as I think Mr. Stimson said. There were challenges to the commission process which, as he put it, were legitimate challenges, ultimately going all the way to the Supreme Court, and when the Supreme Court said that the commissions as constituted earlier on were inadequate and the legislation was required, Congress responded in 2006. There was further criticism of the military commission process. Congress responded again. And President Obama, when he took office, said he wanted to take a look at which forum made most sense, and so he stopped things for a while.

It has been a process of debate within this branch of Government, within the executive branch, and among the American people of uncertainty, I think, about how to proceed, and when we thought we knew how to proceed, we had challenges to tended to gum up the works.

Ms. CHU. Let me ask another question pertaining to the Federal courts. Opponents of trying the conspirators of 9/11 in Federal

criminal courts have argued that Federal courts can't protect classified information and that the defendants will be able to use the trials as a platform for their views. So, Professor Saltzburg, can you respond to those accusations about the Federal courts?

Mr. SALTZBURG. Federal courts have shown they are perfectly capable of protecting classified information. I have personal experience. During Iran-Contra when Lieutenant Colonel North was being prosecuted, I represented the Department of Justice that was responsible for dealing with all classified information, and there has never been a case in which more classified information was in dispute than that case. Federal courts can do it.

As for the second part of the question, which was—can you remind—

Ms. CHU. Using the trials as a platform for their views.

Mr. SALTZBURG. Whatever the forum, military commission or Federal court, the defendant is going to have a chance to address the court, and I suspect that these defendants will say things that will make our blood boil, that will make us angry, that will remind us why we hate them so much. And then a Federal judge or a military commission judge will tell them what Judge Brinkema told Moussaoui, which is in his case you will have 23 hours a day to think about the horrible crimes you committed and, depending on the penalty that is imposed, a Federal judge will have the last word and it is powerful word. And that Federal judge will either be a commission judge or an Article III judge. But the last word will come from a judge.

Ms. CHU. And how does empowering military commissions to try detainees undermine the established authority and expertise of the Federal courts? Do you think that it does or what is your opinion on that, Professor Saltzburg?

Mr. SALTZBURG. I don't think it undermines the authority of Federal courts. The notion, though, that Federal courts can't do this or that because they can't handle classified information or they are unable to deal with unruly defendants just ignores the success that they have had in handling more than 400 terrorist cases. It has not been a problem for Federal courts, and they ought not to be—their ability to do it ought not to be denigrated.

Ms. CHU. Thank you.

I yield back.

Mr. SENSENBRENNER. The Chair now recognizes himself for 5 minutes to close the hearing.

Probably the most famous military commission trials were the ones that were held following the end of the Second World War at Nuremberg and in Tokyo. And, Professor Saltzburg, do you think that the people who were tried in those tribunals should have been tried in an Article III court?

Mr. SALTZBURG. I do not.

Mr. SENSENBRENNER. And why?

Mr. SALTZBURG. Because we were truly in a traditional war against nations, and those combatants who violated the laws of war were seized largely in Germany and Japan and they were prosecuted appropriately there where the evidence was. They were prosecuted promptly. And I think that, looking back, we can take a lot of pride in the way those proceedings were conducted, and

they were conducted, by the way, not only by us but by our allies who joined together in saying this is the way that justice should be done.

Mr. SENSENBRENNER. Well, most of the evidence in terms of the 9/11 plots was not in the United States and most of the conspiracy was not in the United States. So if we are concerned about a chain of evidence problem in a criminal trial in an Article III court, how are you able to get the convictions if you can't get the chain of evidence with the different rules of evidence that are used in criminal trials?

Mr. SALTZBURG. The Attorney General said that he had no doubt that they had sufficient admissible evidence to convict all five persons they had, perfectly capable of accounting for the chain of evidence. Indeed, as I think Mr. Gohmert said, they have admissible statements by the defendants admitting their guilt, which were obtained in a courtroom in a process which there is no doubt in my mind they will be admissible in any tribunal. So we don't have a situation in which, because of the way in which people were seized, that evidence that only exists abroad and is necessary for a prosecution—we don't have that situation here.

Mr. SENSENBRENNER. Mr. Stimson, what is your view on that?

Mr. STIMSON. I think it is speculative at best to suggest that anyone in this room has seen all of the evidence that the prosecution has at their disposal, evaluated in terms of admissibility, and I have no doubt, having seen some of the evidence myself, that there will be more evidence available to the prosecutors in a military commissions context than in a Federal court context. And more evidence is better than less evidence.

Mr. SENSENBRENNER. Ms. Hessler?

Ms. HESSLER. I would agree. Certainly more evidence will be allowed in the military commission.

Mr. SENSENBRENNER. Thank you very much.

That concludes my questions.

I would like to thank all of the witnesses for their testimony. It has all been very relevant and all probably had to have been changed almost 180 degrees when the Attorney General changed his position 180 degrees.

Let me say that I think that the Congress was representing the American people when last Congress, which was under different management than the House is under this Congress, basically put the restrictions on closing Guantanamo, buying a prison in Illinois, and trying KSM and his co-conspirators in New York City. I think we now have gotten through all the preliminaries on in what forum and where the trial will be held. And I hope that there are no further delays by the Government, and I include both the Defense and Justice Departments in that hope so that these people will be placed on trial. If they plead guilty, as they have done before, they can be punished according to law, and I think we can come to closure at least on this phase of 9/11.

So thank you again, and the hearing is adjourned without objection.

[Whereupon, at 11:51 a.m., the Subcommittee was adjourned.]

A P P E N D I X

MATERIAL SUBMITTED FOR THE HEARING RECORD

Statement of Congressman Bobby Scott

Hearing on Military Commissions

April 5, 2011

Good morning. I welcome this hearing as an important discussion about some of the fundamental principles underlying how we attempt to achieve justice in this country.

Yesterday, the Administration announced it will refer the cases of the accused 9-11 plotters to military commissions. I view this announcement not as a choice between viable alternatives, but merely reverting to the last possible option against those who are accused of attacking our people.

The Attorney General had announced at the end of 2009 that the 9-11 plotters would be tried in federal court and that he was extremely confident in the strength of these cases. Since that time, Congress imposed restrictions making it impossible for Guantanamo Bay detainees to be brought to the United States for trials in federal court.

Yesterday's announcement is a reflection of Congress leaving no practical option open to the Administration, and I believe the actions of Congress in that regard to be unwise.

Our federal criminal justice system, with its laws and procedures, is time-tested and provides the best chance of obtaining verdicts against guilty defendants in which we will have confidence and which will withstand court challenges.

Federal courts have convicted 400 people on terrorism related charges over the past 10 years. In contrast, there have only been six convictions under commissions since 9-11 and, during that time, we have learned that the survivability of commissions under court challenges cannot be taken for granted. In fact, federal courts have a stronger record of securing convictions and imposing tough punishments than the military commissions do.

A report by the Center for American Progress found that criminal courts are a tougher and more reliable forum for prosecuting terrorists than military commissions. In fact, terrorists prosecuted by commissions had received shockingly short sentences and some had already been released as of the date of the report one year ago.

We should have confidence in the ability of federal courts to continue to do their job in such cases.

This situation reminds me of the counterproductive juvenile justice policy we have pursued in this country over the past two decades. We know that sentencing juvenile offenders to time in adult prisons actually results in shorter sentences but unfortunately higher rates of recidivism. However, politicians insist on continuing down a path that does more harm than good just because it sounds tough. This is a trap we must avoid.

Prosecuting terrorists front of military commissions could bring significant risk. As we have seen with the prior successful challenges to military

commissions, we cannot know whether the commissions, and perhaps convictions obtained under them, will survive court challenges until those challenges are brought and considered – all the way to the Supreme Court.

Ultimately, by trying terrorists in federal courts, we protect our citizens *and* the principles of the Constitution – which is our ultimate defense against the threats to our nation and freedom.

When Judge Bill Young sentenced shoe bomber Richard Reid in a federal court, he said:

“See that flag, Mr. Reid? That’s the flag of the United States of America. That flag will fly long after all of this is forgotten. That flag still stands for freedom. You know it always will. Custody, Mr. Officer. Stand him down.”

I thank our witnesses for testifying today. It is another hallmark of our democracy that we hear and consider differing points of view, learn from each other, and we are all better for it. So I look forward to hearing their testimony.



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OF TEXAS

COMMITTEE ON THE JUDICIARY

SUBCOMMITTEE ON CRIME, TERRORISM, AND HOMELAND SECURITY

**HEARING ON "Justice for America: Using Military Commissions to Try the
 9/11 Conspirators"**

2141 RAYBURN HOUSE OFFICE BUILDING

TUESDAY, April 5, 2011, 10:00 A.M.

STATEMENT

First, I would like to thank Chairman Sensenbrenner and Ranking Member Scott for holding today's hearing on the controversy over where terror suspects held at the Guantanamo Bay detention camp.

I would also like to thank today's witnesses for taking time out of their schedule to share their expertise with us:

- **David Beamer**, Father of United 93 Passenger Todd Beamer
- **Cully Stimson**, Senior Legal Fellow, The Heritage Foundation
- **Stephanie Hessler**, Fellow, Manhattan Institute for Policy Research
- **Stephen Saltzburg**, Professor of Law, George Washington University

This hearing focuses on the continuing controversy over where terror suspects held at the Guantanamo Bay detention camp should be prosecuted. Although the majority intends to focus on the five detainees accused of plotting the 9/11 attacks including Khalid Sheik Mohammed (KSM) trial, there is also a growing need of focus on the future terror-related attack trials.

In February 2008, KSM and four other alleged 9/11 plotters were charged with murder and other offenses in connection with the attacks in the Guantanamo Bay Military Commission system. In November of that year, the defendants confessed again in a written statement and stated that they wanted to remove their attorneys and plead guilty. However, because it was not clear that a death sentence could be imposed in a military

commission after a guilty plea, that proposal raised considerably legal uncertainty.

Upon taking office, President Obama initiated a thorough interagency review of the status of each Guantanamo detainee by organizing a task force made up of representatives of the Departments of Justice, Defense, State, Homeland Security, the Director of National Intelligence, and the Joints Chiefs of Staff. This review was highly challenging because the prior Administration had left incomplete or inadequate files, and it took a full year to conduct.

As a result of this review, the President offered a strong defense of trying terror cases in Article 3 courts, and also preserving the option of military commissions where appropriate -- *“[W]henever feasible, we will try those who have violated American criminal laws in federal courts -- courts provided for by the United States Constitution. Some have derided our federal courts as incapable of handling the trials of terrorists. They are wrong. Our courts and our juries, our citizens, are tough enough to convict terrorists. The record makes that clear.”*

Despite the administration's best efforts to try the 9/11 suspects in Article III federal courts, the laws passed by Congress over the last two years have made it increasingly difficult and near to impossible to do so. Therefore, in order to avoid prolonging the wait for prosecution, the Attorney General will allow these particular cases to be tried in military tribunals, despite the looming concerns. The 9/11 conspirators detained at Guantanamo Bay are charged with horrific acts that will be forever imbedded in the memories of all Americans. To be clear, it is not our intent

that the 9/11 conspirators do not receive justice for the acts they committed.

However, as these suspects are tried, and in the future if other terrorist suspects are tried in a like manner, it is important that we have an assessment provision for preservation of a complete case to avoid situations like that which arose with the 9/11 suspects – inadequate files and incomplete chains of evidence. Without a provision requiring proper preservation of a case, there is potential for manipulation and tampering of cases that could lead to unfair distribution of justice.

It is my belief that those convicted of terror attacks on American soil should be tried in an Article III court system to ensure fairness. In an Article 3 Court, cases are tried under our proven criminal justice system in a fair and transparent manner. Proceedings are presided over by a judge appointed by the President and confirmed by the Senate and before a jury of American citizens chosen from a cross-section of the community as juries are chosen in the United States every working day.

Expert studies show that federal courts have a stronger record of securing conviction and imposing tough punishments than the military commissions do. For years, through Administrations of both parties, the federal courts have repeatedly handled complex terrorism cases.

I, and many of my colleagues I presume, agree that these 9/11 victims must get justice. However, I believe that the military commission trial is simply not the most efficient way to seek this justice. “Fairness,” a word that this democracy values, has potential to become a key risk factor.

In the last few years, Congress has passed laws making it almost virtually impossible to try the alleged attackers in federal court. Fortunately, in the cases of the 9/11 conspirators, there has been substantial evidence gathered which almost indefinitely proves their guilt. Whether these individuals are tried in a federal court or a military commission, the evidence favoring conviction is overwhelming. It is a well-known factor that the prosecution has a better chance of convicting in military commissions than in civilian court.

However, the process of military commissions brings up concern for future trials and fairness among other potential terrorist suspects, where there may be less overwhelming evidence of their guilt. Without the proper checks and balances on discretion, this process has the potential to place individuals of specific races or religions in jeopardy of association with terrorism or groups. This very fact is the reason why fairness is vital in these trials, and another reason why I favor the use of Article III courts.

Again, I would like to thank the Chairman for holding this hearing, and thank the witnesses for their testimony. I yield back the remainder of my time.

**Statement of the Honorable John Conyers, Jr.
for the Hearing on
“Justice for America: Using Military Commissions to Try
the 9/11 Conspirators”
Before the Subcommittee on Crime, Terrorism and Homeland Security**

**Tuesday, April 5, 2011, at 10:00 a.m.
2141 Rayburn House Office Building**

Yesterday, the Attorney General announced that the alleged plotters of the September Eleventh attacks will be referred to the Defense Department for prosecution in military tribunals.

I regret this decision. Thousands of American civilians were killed that day on U.S. soil and in airplanes above our skies. As we will hear today, our federal courts are the strongest, most reliable venue for bringing justice to those who perpetrated these terrible acts. Military Commissions – even as improved in 2009 – are untested. They bring great legal risk. And they cause unnecessary friction with our allies around the world.

That said, I do understand the position in which the Administration finds itself. For better or worse, Congress has made it impossible to bring these individuals to court for trial. Under the 2011 Defense Authorization bill for example, no defense funds may be spent to bring Guantanamo detainees to the United States for any purpose – including trial. An even broader prohibition is contained in the spending bill that recently passed the House.

This intrusion on prosecutorial judgment is shameful. And the political demagoguing on this issue, like many other questions of terrorism, has been an embarrassment to the Congress. But, unfortunately, there is no sign that Congress will alter course on this issue any time soon.

With court trial foreclosed by Congress, the options left for bringing the

alleged perpetrators of 9/11 to justice are few. These individuals have been in custody for nearly a decade and there has still be no adjudication of responsibility, and no punishment under law.

The prior Administration obviously bears much of the blame for this state of affairs. For many years, it preferred to hold these men in secret jails, to use the waterboard and other tortures, and to keep them in legal limbo without seeking justice or prosecution of any kind.

That abdication has greatly complicated efforts to bring this matter to a close. So in that sense I understand the Administration's need to make some sort of decision today, even as I disagree with the path chosen.

Critically, however – we must not allow this approach to become “the new normal” in this area. We have long had a bipartisan consensus that federal courts are an appropriate venue for trying serious terrorism cases, and I am hopeful that with the political distraction of these particular defendants out of the way, we can resume the orderly handling of such cases.

Federal courts have prosecuted hundreds of terrorism suspects; these convicts now sit in secure federal prisons, including our super-maximum security prisons from which no one has ever escaped.

These include the trials of al Qaeda terrorists such as 9/11 conspirator, Zacarias Moussaoui, and the so-called "shoe bomber," Richard Reid. It also includes the successful conviction of the African embassy bomber Ahmed Ghailani, recently sentenced to life imprisonment without possibility of parole. Other successful terrorism prosecutions include:

- The “Blind Sheik” Omar Abdel-Rahman was convicted in 1996 of terrorism offenses related to the first World Trade Center bombing and other plots and is currently serving a life sentence in federal prison.

- The Kenya and Tanzania embassy bombers were tried in Manhattan sentenced in 2000 to life imprisonment without possibility of parole.
- Ahmed Omar Abu Ali was convicted in November 2005 of conspiracy to assassinate the U.S. President and conspiracy to commit air piracy and conspiracy to destroy aircraft. Ali was sentenced to 30 years in prison.
- In September 2009, Najibullah Zazi was charged with conspiring to use a weapon of mass destruction as part of an al-Qaeda plot bomb targets in the United States. Several of his alleged associates have been arrested and charged in federal court.

Furthermore, this should not be a partisan issue. Hundreds of terrorism cases were prosecuted in court by the Bush Administration. Indeed, in its final budget request to the Congress, the Bush Administration described its record in terrorism cases as follows:

“Since September 11, 2001, the Department has charged 512 individuals with terrorism or terrorism-related crimes and convicted or obtained guilty pleas in 319 terrorism-related and anti-terrorism cases.”

A bipartisan collection of military and law enforcement professionals agree:

- **Former Secretary of State Colin Powell** - “Let’s get this population of 192 [at Guantanamo Bay] sorted out. I have no problem with them being tried here in the United States.”
- **Marine Corps Generals Joseph Hoar, Charles Krulak and 31 fellow officers** -- “[C]ritics claim that a trial in federal court will provide a platform for these terrorists to spread their message of hate. On the contrary, we are confident that these trials will showcase America at its best, a nation of laws. In the war of ideals, we can only lose if we forfeit ours.”

- **Former FBI Director William Sessions** - “If we're looking for justice for the victims of terror, if we're looking to securely lock up those who have committed or sought to commit terrorist acts against American citizens, our federal courts provide the proven and reliable way to ensure that justice. The federal courts have a demonstrated track record in bringing terrorists to justice.”
- **Former Bush Administration Deputy Attorney General Jim Comey and Office of Legal Counsel Head Jack Goldsmith** - “One reason commissions have not worked well is that changes in constitutional, international and military laws since they were last used, during World War II, have produced great uncertainty about the commissions' validity. This uncertainty has led to many legal challenges that will continue indefinitely -- hardly an ideal situation for the trial of the century. By contrast, there is no question about the legitimacy of U.S. federal courts to incapacitate terrorists. . . . Many of these terrorists are locked in a supermax prison in Colorado, never to be seen again.”

On the other hand, the Guantanamo-based military commissions are unavoidably tainted by the unlawful policies of the Bush Administration. As a result, they are essentially a propaganda gift to al-Qaeda recruiters.

Most fundamentally, where the so-called “jury” is composed of military members – the same military that is holding the defendant captive and that is prosecuting the case – its verdict will never win broad acceptance and credibility.

Beyond this basic flaw, the military commissions have completed just five cases, including three by plea bargain. Proceedings have been marred by irregularities and inconsistent application of ever-changing procedural and evidentiary rules. And these untested procedures have yet to withstand appellate review, making verdicts they produce highly vulnerable to reversal.

The Commissions also raise serious questions under international law by

permitting retroactive criminal charges, and by authorizing novel purported war crimes such as conspiracy and material support. As a result, any military commission verdict is unnecessarily vulnerable.


The commission process has improved with the enactment of the 2009 Military Commissions Act and Defense Department's promulgation of detailed Commission Rules released last year.

Particularly with respect to counsel in capital cases, these new processes are a step in the right direction.

But that is just one step, and many more need to be taken. For example, the Defense Department rules:

- continue to allow the introduction of coerced statements under certain circumstances;
- deem evidence derived from statements obtained by cruel, inhumane, and degrading treatment to be admissible if "use of such evidence would otherwise be consistent with the interests of justice;" and
- authorize new military commission offenses to be applied retroactively, even if the charged conduct was not considered a war crime at the time it was committed, as may be the case with conspiracy and providing material support to terrorists.

In my view, the risk presented by allowing military commissions to try the most important terrorism prosecutions in a generation – the 9/11 cases – under a new, untested, and untrusted system is a risk that we should not undertake. I understand that the Administration sees it differently. And I will be watching closely to see how this next phase of the matter unfolds.



Congressman Henry C. "Hank" Johnson, Jr.
Statement for the Hearing on
"Justice for America: Using Military Commissions to Try
the 9/11 Conspirators"

April 5, 2011

Yesterday, Attorney General Holder announced that Khalid Sheikh Mohammed and the other the alleged co-conspirators of the September 11th attacks will be tried in military tribunals instead of the federal court system.

I am disappointed by the Administration's announcement that it will reverse course and seek the prosecution of suspected September 11th co-conspirators in the military commissions system instead of in our federal courts system. Thousands of Americans lost their lives on September 11th. I have faith in our federal courts system and sincerely believe that our federal courts system is the proper venue for trying the alleged co-conspirators.

Our federal courts system is tried and true – federal courts have prosecuted hundreds of individuals of terrorism related offenses since September 11th with a prosecution rate of over 90%. To date, federal courts have secured over 400 terrorism-related convictions since September 11th while the military commissions system has convicted only six, three of whom have already been released.

Still, this was a tough decision for the Administration to make. The Administration has its hands tied. Families who have lost loved ones during the September 11th attacks have been seeking justice for nearly a decade. As the

Attorney General stated yesterday, justice for these families should not be delayed any longer.

Congress has prohibited the Administration from bringing detainees into the United States, even for prosecution. It is a shame that politics has infringed on the Executive Branch's right to make a vital prosecutorial decision.

While I wholeheartedly believe that the U.S. federal courts system is equipped with the necessary tools to try the suspected September 11th co-conspirators, and bring justice to those who have lost their lives during that attack, I understand that the Administration does not have many choices. Congress has blocked its ability to try these individuals in the United States.

With that, I yield back the balance of my time.



Department of Justice Fact Sheet
The Criminal Justice System as a Counterterrorism Tool

The Obama administration is committed to using every instrument of national power to fight terrorism – including intelligence and military operations as well as the criminal justice system. As a counter-terrorism tool, the criminal justice system has proven incredibly effective in both incapacitating terrorists and gathering valuable intelligence from and about terrorists. In every instance, the administration will use the tool that is most effective for fighting terrorism, and will make those decisions based on pragmatism, not ideology.

I. Intelligence Collection

The criminal justice system has been the source of extremely valuable intelligence on al-Qaeda and other terrorist organizations. The criminal justice system provides powerful incentives for suspects to provide accurate, reliable information, and the Department of Justice and FBI work closely with the rest of the intelligence community to maximize information and intelligence obtained from each cooperator. Below are just a few public examples.

Cooperators Provide Intelligence on al-Qaeda and Other Terror Groups

- L’Houssaine Kherchtou, who was arrested, Mirandized, charged with terrorism offenses, and cooperated with the government, provided critical intelligence on al-Qaeda. He testified in 2001 against four al-Qaeda members who were later sentenced to life in prison after being convicted in connection with the East Africa Embassy bombings.
- After his capture in Afghanistan, John Walker Lindh pleaded guilty in 2002 to supporting the Taliban and, as part of his plea agreement, provided valuable intelligence about training camps and fighting in Afghanistan.
- Mohammed Junaid Babar, arrested in 2004 for supporting al Qaeda and plotting attacks in the United Kingdom, has provided intelligence on terrorist groups operating along the Afghanistan/Pakistan border and has testified in the successful trials of terrorists in the United Kingdom and Canada. He is scheduled to testify in another terrorism trial in New York later this year.

- David Headley, arrested in 2009 and charged in connection with a plot to bomb a Danish newspaper and his alleged role in the November 2008 terror attacks in Mumbai, has provided extremely valuable intelligence regarding those attacks, the terrorist organization Lashkar y Tayyiba, and Pakistan-based terrorist leaders.
- Adis Medunjanin, an alleged associate of Najibullah Zazi, was taken into custody in January 2010, and, after waiving his Miranda rights, provided detailed information to the FBI about terrorist-related activities of himself and others in the United States and Pakistan. He has been charged with conspiring to kill U.S. nationals overseas and receiving military-type training from al-Qaeda.
- Other law enforcement cooperators are currently providing important intelligence regarding terrorist activity from East Africa to South Asia and regarding plots to attack the United States and Europe.

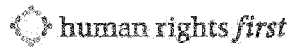
II. Incapacitating Terrorists

Hundreds of terrorism suspects have been successfully prosecuted in federal court since 9/11. Today, there are more than 300 international or domestic terrorists incarcerated in U.S. federal prison facilities. Events over the past year demonstrate the continuing value of federal courts in combating terrorism. In 2009, there were more defendants charged with terrorism violations in federal court than in any year since 9/11.

Past Terrorism Convictions and Recent Terrorism Indictments

- Richard Reid was arrested in December 2001 and convicted pursuant to a guilty plea in October 2002 of attempting to ignite a shoe bomb while on a flight from Paris to Miami carrying 184 passengers and 14 crewmembers. He is serving a life prison term.
- Ahmed Omar Abu Ali was convicted in November 2005 of conspiracy to assassinate the U.S. President and conspiracy to commit air piracy and conspiracy to destroy aircraft. Ali was sentenced to 30 years in prison.
- In May 2006, Zacarias Moussaoui was sentenced to life in prison after pleading guilty to various terrorism violations, admitting that he conspired with al-Qaeda to hijack and crash planes into prominent U.S. buildings as part of the 9/11 attacks.

- In September 2009, Najibullah Zazi was charged with conspiring to use a weapon of mass destruction as part of an al-Qaeda plot bomb targets in the United States. Several of his alleged associates have been arrested and charged in federal court.
- During 2009, 14 individuals were charged in the District of Minnesota connection with an ongoing investigation of individuals who have traveled from Minnesota to Somalia to train with or fight on behalf of the terrorist group al-Shabaab.
- In September 2009, Daniel Patrick Boyd and others were charged with plotting an attack on U.S. military personnel at the Quantico Marine Base, as well as recruiting young people to travel overseas in order to kill.



Closing Guantanamo: National Security Leaders, Legal Experts, 9/11 Victims' Families Support Federal Court Prosecutions

The decision to hold suspected terrorists accountable in U.S. federal courts confers greater credibility on the United States' handling of these cases and helps to promote cooperation from foreign allies. The following quotes from U.S. national security, political, legal experts, as well as 9/11 victims' family members and foreign leaders speak to the many reasons why the United States should try suspected terrorists in U.S. federal criminal courts and to the safety of U.S. prisons to safely hold convicted criminals.

Updated on August 25, 2010

U.S. Military Leaders

Colin Powell knows our federal legal system can handle Guantanamo detainees.

"Guantanamo has become a major, major problem ... in the way the world perceives America.... I would simply move them to the United States and put them into our federal legal system. Essentially, we have shaken the belief the world had in America's justice system by keeping a place like Guantanamo open and creating things like the military commission. We don't need it and it is causing us far more damage than any good we get for it."¹ *Former Secretary of State Colin Powell, June 2007*

Brigadier General Cullen says federal courts confer a needed fairness in trying suspected terrorists. "We should, in trying these five individuals in particular, bring them before a forum about which there is going to be no issue about the fairness of the trial or the procedures or the transparency if in fact these guys are convicted."² *Former Brigadier General James P. Cullen, United States Army Reserve, (Ret.), Former Judge Advocate General's Corps, USA*

Rear Admiral Hutson knows the U.S. federal criminal court system can effectively prosecute 9/11 suspects. "There's been so much irresponsible rhetoric about the threat and the dangers and the incapacity of federal courts to handle these cases and so forth that I think that when these cases go to trial, are safely and successfully prosecuted, that that's going to throw water on all of that discussion and that people – Americans, are going to be – come to understand that we can do this. And that will enable us to get on with it at a much faster pace than we've done up to now where we've just sat around sort of wringing our hands and saying oh woe is us, this is too hard for us to handle."³ *Former Rear Admiral John D. Huston, USN (Ret.), Former Judge Advocate General, U.S. Navy*

¹ <http://www.reuters.com/article/newsOne/idUSN1043646920070610>

² <http://www.humanrightsfirst.org/media/hr/2009/alert/539/index.htm>

³ <http://www.humanrightsfirst.org/media/hr/2009/alert/539/index.htm>

Law Enforcement

New York Police Department Commissioner asserts it's appropriate to prosecute 9/11 suspects in New York. In a reported statement by Raymond Kelly, he said "it's highly appropriate that those accused in the deaths of nearly 3,000 human beings in New York City be tried here, and the NYPD is prepared for the security required."⁴ *Current New York Police Department Commissioner Raymond Kelly*

Former Deputy Chief of the New York Fire Department let's try the 9/11 suspects the right way. According to a New York Times article on November 13, 2009, Jim Riches said "Let them come to New York." "Let them get on trial. Let's do it the right way, for all the world to see what they're like. Let's go. It's been too long. Let's get some justice."⁵ *Retired Deputy Chief of the New York Fire Department, Jim Riches, whose son, Jimmy, also a firefighter, died in the attack*

Former F.B.I. Director says our federal courts will ensure justice is served. "If we're looking for justice for the victims of terror, if we're looking to securely lock up those who have committed or sought to commit terrorist acts against American citizens, our federal courts provide the proven and reliable way to ensure that justice. The federal courts have a demonstrated track record in bringing terrorists to justice."⁶ *William S. Sessions, Former Director of the F.B.I. from 1987 to 1993*

U.S. Political Leaders

Chairman of the Senate Armed Services Committee affirms terrorists can safely held in U.S. prisons. "We should not be cowed by terrorists to the point where we're not even willing to keep them in prisons that are maximum-security prisons. To be intimidated by terrorists so that we can't even try and imprison them in maximum-security prisons in the United States to me is giving in to terrorism."⁷ *Senator Carl Levin (D-MI)*

Mayor of New York supports the decision to hold the trials in his city. "I told him New York City stands ready to assist the federal court in the administration of justice in any way necessary. I have great confidence the New York Police Department and federal authorities will handle security expertly."⁸ *Current Mayor of New York, Michael Bloomberg*

Conservatives say moving Guantanamo detainees to the United States makes "good sense." David Keene, founder of American Conservative Union, Grover Norquist, president of Americans for Tax Reform, and former representative and presidential candidate Bob Barr say moving suspected terrorists to the Thomson, Illinois prison facility, "makes good sense."

⁴ http://www.nydailynews.com/ny_local/2009/11/14/2009-11-14_snipers_dogs_and_small_army_to_keep_city_secure_during_911_terrorists_trial.html.
⁵ http://www.nytimes.com/2009/11/14/nyregion/14york.html?_r=1&ref=us.
⁶ <http://www.humanrightsfirst.org/media/usls/2009/alert/528/index.htm>.
⁷ http://www.mlive.com/news/index.ssf/2009/08/federal_officials_to_tour_stan.html
⁸ <http://www.bloomberg.com/apps/news?pid=20601070&sid=axDbE0Hgb1fo>.

Taxpayers, they note, have already invested \$145 million in the facility, which has been "little used." And the surrounding community, they add, could benefit from increased employment once the prison becomes filled. "The scaremongering about these issues should stop," they add, noting that there is "absolutely no reason to fear that prisoners will escape or be released into their communities."⁹

Chairman of the U.S. Senate Judiciary Committee says federal courts can effectively prosecute suspected terrorists. Praising Attorney General Eric Holder's decision, Senator Leahy said that the federal courts have proved "time and time again" that they're "capable of trying high-profile terrorism and national security cases."¹⁰ *U.S. Senator Patrick Leahy (D-VT)*

Illinois Congresswoman says U.S. courts and prisons can handle Guantanamo detainees. "The Guantanamo Bay facility is a recruiting tool for Al Qaeda and a mark against the morals of the United States. In closing 'Gitmo' and moving some detainees to Illinois, we strengthen our national security, create thousands of jobs, and bring long overdue justice to those who have committed atrocities against the United States. Our American criminal justice and penal systems are fully capable of handling these individuals. In fact, today there are 340 domestic and international terrorists in U.S. prisons, including 35 in Illinois."¹¹ *Congresswoman Janet Schakowsky (D-IL)*

Michigan State Representative believes terrorists would not threaten local communities. "I don't believe terrorists are super human. They are no more dangerous than the Crips and the Bloods. The gangs in California might cause a more dangerous situation [than Guantanamo prisoners]."¹² *Michigan State Rep. Joel Shelltown (D)*

9/11 Widows

9/11 widow speaks out about trying suspected terrorists in federal courts. "I was extremely pleased by the announcement that they will be moving these trials to the federal court system. I have always felt that the credibility of any verdict born out of the broken military commissions system, a system that was secretive in nature, lacked due process, used evidence tainted by questionable interrogation methods, would lack legitimacy. And at the end of the day, the only outcome worth pursuing is the truth and the only way to get there is by fair trials that uphold the constitution. If we tried these suspects in the military commission system, I think that would prove to be more dangerous to us because people who sympathized with them would feel that any verdict coming out of that system that was secretive, whereby we knew that the evidence was questionable – they might have had more of a problem accepting that verdict and might have been more tempted to start trouble here. I think that by using our federal court system and having total transparency will lessen the case and will lessen our danger."¹³ *Mindy Kleinberg, September 11th Advocates*

⁹ http://www.huffingtonpost.com/2009/11/16/conservative-trio-support_n_358928.html

¹⁰ <http://www.miamiherald.com/692/story/1332191-p2.html>

¹¹ http://schakowsky.house.gov/index.php?option=com_content&task=view&id=2662&Itemid=16

¹² <http://michiganmessenger.com/24764/gitmo-or-no-house-panel-hears-testimony-on-whether-to-move-prisoners-to-standish>

¹³ <http://www.humanrightsfirst.org/media/hr/2009/alert/539/index.htm>

9/11 widow supports prosecuting 9/11 suspects in New York city. “I certainly believe that we’re finally on the path of justice being served and it is one piece to a path of justice and I believe that bringing these people to New York City finally avails the victims of 9/11 and their families to see the prosecution of these people as a – to this point, families have been able to, by lottery system, go to Cuba to see pieces of certain trials. That’s not really fair to families who wish to see justice being served to their loved ones. And this finally will avail them of that justice, bring them here. And I’m fully confident in our system of justice to guard – people and place, the city around the court systems as well as the people on trial.”¹⁴ *Patty Casazza, September 11th Advocates*

Corrections Professionals

American Correctional Association declares Americans would be safe should detainees be transferred to U.S. prison facilities. “THEREFORE BE IT FURTHER RESOLVED that the American Correctional Association does hereby assure Congress and our elected leaders that they can have every reasonable expectation that public safety would be secure and that there would be no danger or imminent threat to the American people should they decide to transfer detainees from foreign countries to federal, state or military facilities in the United States.”¹⁵ *Resolution was adopted by the American Correctional Association Delegate Assembly on Aug. 12, 2009, at the Congress of Correction in Nashville, Tenn.*

Foreign Leaders

European government officials and attorneys raise opposition to the U.S. government’s use of military commissions. According to a November 2001 *New York Times* article, “no country in Europe could extradite detainees to the United States if there were any chance they would be put before these military tribunals,” said a Spanish prosecutor. The news article went on to say “the use of hearsay evidence, which would be allowed in the tribunals under Mr. Bush’s order, would not trouble some European nations, but would raise hurdles in the United Kingdom and Ireland, where it is forbidden.”¹⁶

U.S. Judiciary Leaders

President of the American Bar Association says trying 9/11 suspects in federal courts will assure accountability to America’s victims and the international community. “The military commissions under which these high-profile detainees were first charged were constitutionally flawed and scorned by the international community. Despite procedural improvements enacted in the Military Commissions Act of 2009, we believe that a decision to resume their prosecution in military commissions would have failed to provide the credibility that is essential to acceptance of any final verdict. Our federal courts, respected around the world, are well-equipped to handle trials of this magnitude. They will provide a fair and impartial forum for bringing these accused criminals to

¹⁴ <http://www.humanrightsfirst.org/media/hr/2009/alert/539/index.htm>.

¹⁵ http://www.aca.org/government/policy/resolution/view.asp?ID=71&origin=results&QS=PoliciesAndResolutionsYMGHFERName=safety&PoliciesAndResolutionsYMGHFERType=Resolution&sortId_360=Name&revcrssearch=false&viewby=50&union=AND&starrec=1&top_parent=360&printview=1.

¹⁶ <http://www.nytimes.com/2001/11/24/international/europe/24SPA1.html>.

justice and will assure transparency and accountability to victims and the international community.”¹⁷ *Carolyn B. Lamm, President, American Bar Association*

U.S. Judge, which presided over the 2003 trial of the "shoe bomber," Richard Reid, says it's better to try terrorists as criminals. During the sentencing of Reid, Judge Young said "You are not an enemy combatant. You are a terrorist. You are not a soldier in any war. . . To give you that reference, to call you a soldier, gives you far too much stature."¹⁸ *U.S. Judge William Young*

Two former Illinois U.S. Attorneys support trying Guantanamo Bay detainees in federal courts and housing them in U.S. prisons. "We support trials for the detainees in our federal courts, which means that they must be brought to the U.S. to stand trial and thus must be housed in appropriate prisons in this country,"¹⁹ *The quote came from a letter that Ex-Northern District of Illinois U.S. Attorneys Thomas P. Sullivan and Dan K. Webb wrote in late November 2009 about placing Guantanamo Bay detainees in a Thomson, Ill., state prison.*

U.S. District Court Judge says the U.S. Constitution applies anytime U.S. authorities exercise its jurisdiction or powers. Responding to arguments made by prosecution that the U.S. Constitution does not apply to a U.S. Court in Berlin, Germany, U.S. District Judge Stern said "there has never been a time when U.S. authorities exercised governmental powers in any geographic area – whether at war or in times of peace – without regard for their own Constitution." Stern went on to explain "the Constitution of the United States is a law for rulers and people, equally in war and in all times, and under all circumstances."²⁰ *Former U.S. District Court Judge Herbert J. Stern was nominated by Richard Nixon and served for 13 years as a U.S. Judge*

U.S. Supreme Court Justice says U.S. government violated the U.S. Constitution when it used military commissions against Yamashita. Dissenting in the U.S. Supreme Court case *Ex Parte Yamashita* (1945), Justice Frank Murphy said Yamashita's Fifth Amendment (due process) rights had been "grossly and openly violated without any justification." Murphy further noted no exception "is made as to those who are accused of war crimes or as to those who possess the status of an enemy belligerent."²¹ *Former U.S. Supreme Court Justice Frank Murphy was on the court from 1940 to 1949*

U.S. Supreme Court Justice favors federal civilian courts to try terrorism cases. At the 9th Circuit Judicial Conference, a panel discussion reached a consensus in favor of using civilian courts instead of military commissions. "Article III courts are quite capable of trying these terrorist cases," Supreme Court Justice Anthony Kennedy said.²² *U.S. Supreme Court Justice Anthony Kennedy*

¹⁷ http://www.abanet.org/policy/letters/antiterror/2009nov25_guantanamo1.pdf

¹⁸ <http://www.hrw.org/en/news/2009/11/13/us-federal-court-prosecution-911-suspects-victory-justice>.

¹⁹ <http://www.mainjustice.com/2009/11/30/illinois-ex-prosecutors-support-civilian-prisons-for-gtmo-detainees/>

²⁰ Louis Fisher, "Military Tribunals & Presidential Power: American Revolution to the War on Terrorism," 2005, University Press of Kansas, page 164-167.

²¹ http://loc.gov/law/hclp/usconlaw/pdf/Detention_JNSL&P.pdf.

²² <http://www.google.com/hostednews/ap/article/ALeqM5jW9hCoQmdTwSfgi-zf31gVjJrX0gD9HmV1G00>



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November 25, 2009

Honorable Eric H. Holder, Jr.
Attorney General of the United States
Department of Justice
950 Pennsylvania Ave., N.W.
Washington, DC 20530

Dear Attorney General Holder:

I am writing on behalf of the American Bar Association to express our support for the recent decision of the Department of Justice to pursue prosecution in federal court of the five Guantanamo detainees accused of conspiring to commit the 9/11 terrorist attacks. The transfer of these high-profile cases to federal court affirms this nation's adherence to due process and the rule of law, and clearly establishes that these men are being tried as criminals, not as soldiers in armed conflict.

Those who plotted the terrorist attacks against the United States must be brought to justice and held fully accountable for their horrific crimes. However, no matter how heinous the charges, the long-awaited trials of these alleged terrorists must be both fair and perceived as fair, or the resulting verdicts will not be recognized as legitimate. The accused must receive the competent assistance of counsel, be afforded due process, and treated as innocent until proven guilty. Americans would not want our citizens who might be arrested and charged in a foreign state to receive anything less.

The military commissions under which these high-profile detainees were first charged were constitutionally flawed and scorned by the international community. Despite procedural improvements enacted in the Military Commissions Act of 2009, we believe that a decision to resume their prosecution in military commissions would have failed to provide the credibility that is essential to acceptance of any final verdict.

Our federal courts, respected around the world, are well-equipped to handle trials of this magnitude. They will provide a fair and impartial forum for bringing these accused criminals to justice and will assure transparency and accountability to victims and the international community.

Sincerely,

Carolyn B. Lamm

REAR ADMIRAL DON GUTER, USN (RET.)
REAR ADMIRAL JOHN D. HUTSON, USN (RET.)
BRIGADIER GENERAL DAVID M. BRAHMS, USMC (RET.)
BRIGADIER GENERAL JAMES P. CULLEN, USA (RET.)

September 9, 2009

The President
The White House
1600 Pennsylvania Avenue NW
Washington, DC 20500

Dear Mr. President:

We have been greatly encouraged by reports that you are considering prosecuting the alleged planners of the 9/11 attacks in federal civilian court, and write to offer our strong support for such an effort. Even if military commissions remain an option for trying some Guantanamo detainees for violations of the laws of war, we believe that it would be wrong to treat the leaders of al Qaeda as warriors deserving of military trials. America's well established system of civilian justice is not just well equipped to handle these cases, it is far better suited to the task of discrediting and defeating the terrorist enemy we face.

When the planners of 9/11, including Khalid Sheikh Mohammed, are finally brought to justice, it will be an extraordinarily important moment in the struggle against terrorism. If these trials are held before civilian judges and juries, it will highlight the strength and legitimacy of our system of justice, and at long last focus the world's attention where it belongs: on the crimes these men committed against us, rather than on how we are treating them.

It will be much harder to achieve these goals if these men are brought instead before a military commission. Even if the commission system is reformed, with improved procedural protections, it will take time to overcome the stigma it acquired during the last administration, when it became a symbol of what was wrong with Guantanamo. Defendants before military commissions will have the advantage of being able to challenge the legitimacy of the system in which they are being tried, instead of simply having to face the evidence against them. These challenges could delay justice and divert attention away from the accused terrorists' crimes. If defendants are convicted - and especially if they are sentenced to death - the verdicts may not be seen as fully legitimate around the world. Particularly in the most prominent terrorism cases, our nation cannot afford more legal controversy and doubt; and we will not have another chance to get this right.

Moreover, even if we had full confidence in the military commissions system, we do not believe that it would be in America's national interest to use it against terrorists who commit atrocities against civilians. Like virtually all terrorists throughout history, al Qaeda members want to be seen as soldiers, not as criminals. That warrior mystique helps them recruit more misguided young men to their ranks, and justifies, in their own

minds, the murder of their enemies. This is why al Qaeda has always described its crimes as acts of "war."

We agree with your counter-terrorism adviser John Brennan that accepting this "global war" mindset served only to "validate al Qaeda's twisted world view." Placing al Qaeda's leaders before a military court would deepen the damage. It would give these men the warrior status they crave. On the other hand, trying them before a civilian court would strip them of their military pretensions, and expose them as the despicable, and yes, common, criminals that they are.

We find it disturbing that some who want to be seen as "tough" on terrorism continue to disparage America's institutions of civilian justice, while reinforcing our enemies' narrative that the murder of civilians is a form of waging war. We trust that you will reject this view, and remind Americans that trying mass murderers before the greatest system of justice in the world will be a mark of strength and of confidence in our democracy.

With respect,

Rear Admiral Don Guter, USN (Ret.)
 Rear Admiral John D. Hutson, USN (Ret.)
 Brigadier General David M. Brahms, USMC (Ret.)
 Brigadier General James P. Cullen, USA (Ret.)

BIOGRAPHICAL INFORMATION

Rear Admiral Don Guter, USN (Ret.)

Admiral Guter served in the U.S. Navy for 32 years, concluding his career as the Navy's Judge Advocate General from 2000 to 2002. Admiral Guter currently serves as President and Dean of the South Texas College of Law in Houston, TX.

Rear Admiral John D. Hutson, USN (Ret.)

Rear Admiral John D. Hutson served in the U. S. Navy from 1973 to 2000. He was the Navy's Judge Advocate General from 1997 to 2000. Admiral Hutson now serves as President and Dean of the Franklin Pierce Law Center in Concord, New Hampshire. He also joined Human Rights First's Board of Directors in 2005.

Brigadier General David M. Brahms, USMC (Ret.)

General Brahms served in the Marine Corps from 1963-1988. He served as the Marine Corps' senior legal adviser from 1983 until his retirement in 1988. General Brahms currently practices law in Carlsbad, California and sits on the board of directors of the Judge Advocates Association.

Brigadier General James P. Cullen, USA (Ret.)

Mr. Cullen is a retired Brigadier General in the United States Army Reserve Judge Advocate General's Corps and last served as the Chief Judge (IMA) of the U.S. Army Court of Criminal Appeals. He currently practices law in New York City.

**JOHN C. COUGHENOUR, UNITED STATES DISTRICT JUDGE
WESTERN DISTRICT OF WASHINGTON**

APRIL 5, 2011

**Subcommittee on Crime, Terrorism, and Homeland Security
Committee on the Judiciary**

Hearing on using military commissions to try the 9/11 conspirators

Letter for the Record on behalf of the Constitution Project

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
 UNITED STATES COURT HOUSE
 SEATTLE, WASHINGTON 98101
 (206) 370-8800

JOHN C. COURTHENOUR
 United States District Judge

March 29th, 2011

Dear Members of the Subcommittee on Crime of the House Judiciary Committee,

I am writing in response to a notice of hearing called by Chairman Sensenbrenner to be held on April 5, 2011 on the subject of using military commissions to try the 9/11 conspirators. I request that my letter be made a part of the record for this hearing.

I have earned my stripes on this topic. The case of Ahmed Ressaam, aka the Millennium Bomber, involved months of trial, three trips to the Ninth Circuit, and one trip to the Supreme Court. In the years since, I have repeatedly argued that the use of military commissions to try these cases is a mistake. They have been slow and ineffective, resulting in only four convictions—and two of those defendants have already been released. They have the potential to elevate ordinary criminals to the status of symbolic warrior-martyrs. They are vulnerable to appeal and reversal. And they limit the willingness and ability of foreign governments to extradite suspects and provide us with evidence.

Supporters of military commissions point to the supposed problems with traditional Article III courts, but these are empty worries.

First, they tell you that a trial or sentencing in an Article III court is prohibitively expensive. The Marshal's Service informed me after the Ressaam Trial that the total cost of security was under \$100,000. A large part of the opposition to Article III trials in the Southern District of New York is the notion that the city would be left with the tab. It is my understanding that the City of Los Angeles and the Los Angeles Police Department did not spend a dollar on security during the Ressaam trial.

Second, they say that we cannot risk bringing these dangerous people to jails and prisons in the United States. But we already have hundreds of accused and convicted terrorists being held in federal prisons inside the United States, and there has not been a single instance where national security has been impacted by their presence in our Bureau of Prisons.

Next, they tell you that such trials will give a defendant an opportunity to spout hateful propaganda. But some of the most memorable moments in this conflict, when I have been most proud to be a judge, have been the showdowns between these men and the judges they face. Remember the words of Judge Bill Young, who closed his sentencing of Richard Reid with these words:

See that flag, Mr. Reid? That's the flag of the United States of America. That flag will fly there long after this is all forgotten. That flag still stands for freedom. You know it always will. Custody, Mr. Officer. Stand him down.

Or Judge Cedarbaum, who deflated the empty rhetoric of Faisal Shahzad, the Times Square bomber, with the simple request: "I do hope that you will spend some of the time in prison thinking carefully about whether the Koran wants you to kill lots of people." In a battle of wits, I think our federal judiciary can hold its own.

Fourth, Supporters of military commissions argue that Article III courts cannot protect sensitive information. Well that's just wrong. Authors of a recent report for Human Rights First, both of whom are former Assistant United States Attorneys, were unable to identify a single instance in which the Classified Information Procedures Act was invoked and there was a significant leak of sensitive information as a result of a terrorism prosecution in federal court.

The most distressing of the arguments against Article III trials is the notion that they might result in too many acquittals. Not only is this argument contrary to fact, it's contrary to our values. Since September 11, 2001, of the approximately 591 individuals charged in terrorism-related cases that have been resolved, only 9 were acquitted—a conviction rate between 98 and 99%. What is worse is that with these commissions, we would be creating a separate and unequal system of criminal justice. How would we make the threshold determination of which court system to try these people in? And who would make that determination?

And why should the object of our criminal justice system be to secure convictions? The rule of law floats belly up when we abandon our constitutional promises the moment we do not like a defendant. A justice system that is designed to guarantee convictions is not worthy of the name. Justice Frankfurter wrote that "it is a fair summary of history to say that the safeguards of liberty have frequently been forged in controversies involving not very nice people." As Americans, we have been given a priceless heirloom by giants such as Justice Frankfurter. And those giants held on to that heirloom through thin times, times of poverty, and times of fear. What troubles me is that our generation is going to be the one to pawn it.

Sincerely,



John C. Coughnour
United States District Judge
Western District of Washington



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June 21, 2011

Subcommittee on Crime, Terrorism, and
Homeland Security of the
House Committee on the Judiciary
B 3708 Rayburn House Office Building
Washington, D.C. 20515

Dear Chairman Smith and Ranking Member Conyers:

Attached, please find a copy of *Beyond Guantanamo: A Bipartisan Declaration*. On behalf of the Constitution Project and Human Rights First, I respectfully request that a copy of the *Declaration* be admitted as part of the record for the Subcommittee's hearing on April 5, 2011 entitled "Justice for America: Using Military Commissions to Try the 9/11 Conspirators."

The *Declaration* is endorsed by nearly 140 prominent experts in national security, including former federal prosecutors, judges, military leaders, Members of Congress, 9/11 Victim Family members, and intelligence experts. The *Declaration* supports the use of our traditional criminal justice system to try terrorism suspects currently held at the detention facility at Guantanamo Bay, Cuba and opposes their indefinite detention without charge.

Sincerely,

Mason C. Clutter
Counsel

Attachments

Beyond Guantanamo

A Bipartisan Declaration

Declaration Supporting Federal Court Prosecution of Terrorism Suspects and Opposing Indefinite Detention Without Charge

We, the undersigned, urge Congress and the President to support a policy for detention, treatment and trial of suspected terrorists that is consistent with U.S. treaty obligations and constitutional principles. As it moves to close Guantanamo and develop policies for handling terrorism suspects going forward, the government should rely upon our established, traditional system of justice. We are confident that the government can preserve national security without resorting to sweeping and radical departures from an American constitutional tradition that has served us effectively for over two centuries.

Civilian federal courts are the proper forum for terrorism cases

Over the last two decades, federal courts constituted under Article III of the U.S. Constitution have proven capable of trying a wide array of terrorism cases, without sacrificing either national security or fair trial standards.

Prosecutions for terrorism offenses can and should be handled by traditional federal courts, which operate under statutes and procedures that provide the tools necessary to try such complex cases. Moreover, the War Crimes Act explicitly gives federal courts jurisdiction to try certain war crimes.

Terrorism suspects should be criminally tried, not detained without charge

We believe it is unconstitutional to detain indefinitely terrorism suspects in the United States without charge, either for the purposes of interrogation and intelligence-gathering or solely on the basis of suspected dangerousness. There are limited times when preventive detention, subject to required procedural protections, is appropriate in the context of armed conflict. However, the continued detention without charge of the detainees remaining in Guantanamo is not appropriate and is contrary to American values.

Indefinite detention without charge is counterproductive and harms the U.S. reputation globally

Instituting a system of indefinite detention without charge in the United States for terrorism suspects would threaten the constitutional protections enshrined in our justice system and is simply bad policy. Such a system would undoubtedly result in protracted litigation, delaying justice in these cases. In addition, establishing a system of detention without charge would damage the ability of the United States to promote respect for human rights around the world, embolden human rights violators, and tarnish our Nation's reputation with international allies. Thus, by discouraging cooperation by international allies and communities around the world whose assistance is needed to defeat terrorism, a system of detention without charge would undermine U.S. counterterrorism and counterinsurgency efforts and thereby also increase the danger to American military and other U.S. personnel serving abroad.

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Beyond Guantanamo: A Bipartisan Declaration Signatories To Date

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Lawyer, Newport Beach, California

Morton Abramowitz, Senior Fellow, The Century Foundation; former President, Carnegie Endowment for International Peace; Ambassador to Turkey, 1989-1991, Thailand, 1978-1981 and to the Mutual and Balanced Force Reduction Negotiations in Vienna, 1983-1984; former Assistant Secretary of State for Intelligence and Research; former Deputy Assistant Secretary of Defense for Inter-American, East Asian, and Pacific affairs; former Special Assistant to the Secretary of Defense and to the Deputy Secretary of State; former political adviser to the Commander-in-Chief, Pacific

Matthew Alexander, Former Senior Military Interrogator; four-time combat veteran; author of *How to Break a Terrorist and Kill or Capture*.

Azizah al-Hibri, Professor, The T.C. Williams School of Law, University of Richmond; President, Karamah: Muslim Women Lawyers for Human Rights

Dennis Archer, President, American Bar Association, 2003-2004; Mayor, Detroit, 1994-2001; Associate Justice, Michigan Supreme Court, 1986-1990

J. Brian Atwood, Dean, Humphrey Institute; former Administrator, U.S. Agency for International Development (USAID); head of transition team, State Department; former Under Secretary of State for Management; former Adjunct Lecturer at Harvard's JFK School; former Sol M. Linowitz Professor for International Affairs, Hamilton College; Director, Citizens International

Lourdes G. Baird, Judge, U.S. District Court for the Central District of California, 1992-2005, Los Angeles Superior Court, 1988-1990, Los Angeles Municipal Court, 1987-1988, and Municipal Court, East Los Angeles Judicial District, 1986-1987; U.S. Attorney, Central District of California, 1990-1992; Assistant U.S. Attorney, Central District of California, 1977-1983

Doug Bandow, former Special Assistant to President Ronald Reagan

William Banks, Professor, Director, the Institute for National Security and Counterterrorism; Laura J. & L. Douglas Meredith Professor of Law, Syracuse University College of Law

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Bob Barr, Member of U.S. Congress (R-GA), 1995-2003; CEO, Liberty Strategies, LLC; the 21st Century Liberties Chair for Freedom and Privacy, the American Conservative Union, 2003-2008; Chairman, Patriots to Restore Checks and Balances; Practicing Attorney

Richard E. Benedick, President, National Council for Science and the Environment; Visiting Fellow, the Wissenschaftszentrum Berlin (Social Science Research Center), since 1995; former Diplomat to Iran, Pakistan, Paris, Bonn, and Athens; former Deputy Assistant Secretary of State for Environment, Health, and Natural Resources

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Barbara A. Caulfield, Judge, U.S. District Court, Northern District of California, 1991-1994

Steven Clemons, Director of American Strategy Program, New America Foundation; Publisher of *The Washington Note*; Co-Founder, Japan Policy Research Institute

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Larry Edwin Craig, U.S. Senator (R-ID), 1991-2009, Chairman of the Senate Committee on Veterans' Affairs, 2005-2007; President, New West Strategies

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Bruce Fein, former Associate Deputy Attorney General and Assistant Director, Office of Legal Policy, U.S. Department of Justice; former General Counsel, Federal Communications Commission; former Research Director for the Joint Congressional Committee on Covert Arms Sales to Iran; former Executive Director, World Intelligence Review; Adjunct Scholar, American Enterprise Institute; Resident Scholar, Heritage Foundation; Lecturer, Brookings Institute; Adjunct Professor, George Washington University

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Talat Hamdani, Member, September Eleventh Families for Peaceful Tomorrows; civil liberties and human rights activist; mother of Mohammad Salman Hamdani, a NYPD Cadet and NYS Certified Paramedic who died in the line of duty in WTC II on September 11, 2001; Salman is mentioned in the Patriot Act for his heroism as a Muslim American

William C. Harrop, Foreign Service Officer, 1954-1993; former Ambassador to Guinea, Kenya, Seychelles, Zaire and Israel; former Inspector General, U.S. Department of State and the Foreign Service

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David A. Kay, Former Head of the Iraq Survey Group; former Special Advisor on the Search for Iraqi Weapons of Mass Destruction to the Director of Central Intelligence

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Charles C. Krulak, General (Ret.) United States Marine Corps; 31st Commandant of the Marine Corps

L. Bruce Laingen, 38 years, US Foreign Service until 1987; 3 years as Executive Director of Paul Volcker's National Commission on the Public Service; 15 years as President of the American Academy of Diplomacy; Ambassador to the Republic of Malta, 1977 – 1979; Chief of Mission in Tehran following the Revolution there in 1979, until taken Hostage there and help captive for 444 days

Thomas D. Lambros, Chief Judge, U.S. District Court, Northern District of Ohio, 1990-1995 and Judge, 1967-1995

David Lawrence, Jr., President, Early Childhood Initiative Foundation; former Publisher, *Miami Herald* and *Detroit Free Press*

John Leinung, Member, September Eleventh Families for Peaceful Tomorrows; step-father of Paul J. Battaglia, who died in WTC Tower 1, 100th floor

James A. Lewis, Director, Technology and Public Policy Program, Center for Strategic and International Studies

Timothy K. Lewis, Judge, U.S. Court of Appeals for the Third Circuit, 1992-1999; Judge, U.S. District Court, Western District of Pennsylvania, 1991-1992; former Assistant U.S. Attorney, Western District of Pennsylvania; former Assistant District Attorney, Allegheny County, Pennsylvania; Co-Chair, Appellate Practice Group, Schnader Harrison Segal & Lewis LLP

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Scott McConnell, Editor-at-Large of *The American Conservative*

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Harry C. McPherson, Jr., White House Counsel, 1965-1969

Nancy Meyer, Project Director, September Eleventh Families for Peaceful Tomorrows; sister-in law to Lauren Catuzzi Grandcolas, who was a United Flight 93 victim

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William H. Neukom, President, American Bar Association, 2008-2009

Grover Norquist, President, Americans for Tax Reform

Donna Marsh O'Connor, Member, September Eleventh Families for Peaceful Tomorrows; Professor, Syracuse University; mother of Vanessa Lang Langer, who died on 9/11 at the WTC Tower II

Richard O'Meara, Brigadier General (Ret.) U.S. Army, 1967-2002; Professor, Rutgers University-Newark and Richard Stockton College; Adjunct Faculty, Defense Institute of International Legal Studies

Stephen M. Orlofsky, Partner, Blank Rome LLP; District Judge, 1996-2003, and U.S. Magistrate Judge, District of New Jersey, 1976-1980

Michael Ostrolenk, National Director of the Liberty Coalition; Founder and National Coordinator, Medical Privacy Coalition; President and Co-Founder, American Conservative Defense Alliance

Charles Otstott, Lieutenant General (Ret.) U.S. Army; Infantryman Command of the 25th Infantry Division (Light), 1988-1990; Deputy Chairman, NATO Military Committee, 1990-1992

Pete Peterson, U.S. Member of Congress (D-FL), 1991-1997; Ambassador to Hanoi, 1997-2001

Thomas R. Pickering, Undersecretary of State for Political Affairs, 1997-2000; U.S. Ambassador and Representative to the United Nations, 1989-1992

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Redding Pitt, U.S. Attorney, Middle Alabama, 1993-2000

George W. Proctor, U.S. Attorney, Eastern Arkansas, 1979-1987

Anthony Quainton, Ambassador to Kuwait, 1984-1987; Distinguished Diplomat in Residence, American University

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James H. Reynolds, U.S. Attorney, Northern District of Iowa, 1976-1982; U.S. Attorney, South Dakota by Special Appointment of U.S. Attorney General, 1978-1979; Section Director, U.S. Attorney General's Advocacy School, 1979

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William D. Ruckelshaus, Administrator, Environmental Protection Agency, 1970-1973; acting Director, Federal Bureau of Investigation, 1973; Deputy Attorney General, U.S. Department of Justice, 1973; Strategic Director, Madrona Venture Group; Chairman, the Puget Sound Partnership

Murray G. Sagsveen, Brigadier General (Ret.) U.S. Army; Staff Judge Advocate for the State Area Command, Special Assistant to the National Guard Bureau Judge Advocate, Army National Guard Special Assistant to the Judge Advocate General of the Army; General Counsel, American Academy of Neurology

Wright Salisbury, Member, September Eleventh Families for Peaceful Tomorrows; founder of the Alliance for Jewish-Christian-Muslim Understanding; father-in-law of Ted

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Hennessey, Jr., who died on 9/11 on American Airlines Flight 11

Stephen A. Saltzburg, Attorney General's ex-officio Representative, U.S. Sentencing Commission, 1989-1990; Deputy Assistant Attorney General, Criminal Division, U.S. Department of Justice, 1988-1989

Donald E. Santarelli, Administrator, Law Enforcement Assistance Administration, Department of Justice, 1973-1974; Associate Deputy Attorney General, 1969-1972; Special Counsel, Senate Judiciary Committee on Constitutional Rights, 1968-1969; Minority Counsel, U.S. House of Representatives Committee on the Judiciary, 1967-1968; Assistant U.S. Attorney, District of Columbia, 1966-1967

H. Lee Sarokin, Judge, U.S. Court of Appeals for the Third Circuit, 1994-1996; Judge, U.S. District Court, District of New Jersey, 1979-1994

Daniel S. Seikaly, Chief of the Criminal Division, U.S. Attorney's Office, District of Columbia, 2001-2004; Associate Inspector General for Investigations, Central Intelligence Agency, 1998-2001; Associate Deputy Attorney General, U.S. Department of Justice, 1996-1998

William S. Sessions, Director of the FBI, 1987-1993; Chief Judge, 1980-1987, and Judge, 1974-1987, U.S. District Court for the Western District of Texas; U.S. Attorney, Western District of Texas, 1971-1974

Jerome Shestack, Senior Counsel, Wolf, Block, Schorr and Solis-Cohen, LLP; President, American Bar Association, 1997-1998

Earl J. Silbert, Partner, DLA Piper; U.S. Attorney, District of Columbia, 1974-1979; Former Watergate Prosecutor

Richard Sobel, Visiting Scholar, Buffett Center for International and Comparative Studies, Northwestern University; founding Director of the Cyber Privacy Project

Neal Sonnett, Chair, American Bar Association Task Force on Treatment of Enemy Combatants and Task Force on Domestic Surveillance in the Fight Against Terrorism

Nancy Soderberg, former Deputy Assistant to the President for National Security Affairs; Ambassador and Alternate Representative to the United Nations

Theodore C. Sorensen, White House Counsel, 1961-1963

Walter L. Stewart, Jr., Major General (Ret.) U.S. Army; Commander, 28th Infantry Division; veteran of U.S. operations in Vietnam and Cambodia

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Thomas P. Sullivan, U.S. Attorney, Northern District of Illinois, 1977-1981; Former Co-Chair of the Illinois Governor's Commission on Capital Punishment, 2000-2008

John F. Tate, President, Campaign for Liberty

Charles Tiefer, General Counsel (Acting) 1993-1994, Solicitor and Deputy General Counsel, 1984-1995, U.S. House of Representatives

Joshua Treem, Assistant U.S. Attorney, District of Maryland, 1973-1978

James B. Tucker, U.S. Attorney, Southern Mississippi, 2001

Dane vonBreichenruchardt, President, U.S. Bill of Rights Foundation

Colby Vokey, Lieutenant Colonel (Ret.) U.S. Marine Corps, 1987-2008; Lead Counsel for Guantanamo detainee Omar Khadr at Military Commissions, 2005-2007; Attorney, Fitzpatrick Hagood Smith & Uhl, LLP

Patricia M. Wald, Chief Judge, 1986-1991, and Judge, 1979-1999, U.S. Court of Appeals for the D.C. Circuit

Edward G. Warin, U.S. Attorney, District of Nebraska, 1977-1981

Alexander F. Watson, Assistant Secretary of State for Western Hemisphere Affairs, 1993-1996; U.S. Deputy Permanent Representative to the United Nations, 1989-1993; Ambassador to Peru, 1986-1989; Deputy Chief of Mission, Brazil, 1984-1986, Colombia, 1981-1984, and Bolivia, 1979-1981

Dan K. Webb, U.S. Attorney, Northern District of Illinois, 1981-1985

H. Thomas Wells, Jr., President, American Bar Association, 2009-2010

Adele Welty, Member, September Eleventh Families for Peaceful Tomorrows; mother of firefighter Timothy Welty, who was lost in the line of duty at the World Trade Center; opposed to capital punishment and testified for the defense in the Moussaoui trial

James J. West, U.S. Attorney, Middle District of Pennsylvania, 1985-1993; First Assistant U.S. Attorney, Middle District of Pennsylvania, 1982-1985; Deputy Attorney General, Deputy Director of the Office of Criminal Law Enforcement, Pennsylvania DOJ, 1979-1982; Assistant U.S. Attorney, Western District of Pennsylvania, Chief of the Appellate Section, 1974-1979

Daniel E. Wherry, U.S. Attorney, District of Nebraska, 1975-1978

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John W. Whitehead, President, The Rutherford Institute

Lawrence Wilkerson, Colonel (Ret.) U.S. Army; Visiting Pamela C. Harriman Professor of Government at the College of William and Mary; Professorial Lecturer in the University Honors Program at the George Washington University; former Chief of Staff to Secretary of State Colin Powell, 2002-2005

Roger Wilkins, Clarence J. Robinson Professor Emeritus of History and American Culture, George Mason University; Director of U.S. Community Relations Service, Johnson administration, 1964-1966

William D. Wilmoth, U.S. Attorney, Northern District of West Virginia, 1993-1999

Stephen N. Xenakis, Brigadier General (Ret.) U.S. Army, Commanding General of the Southeast Army Regional Medical Command; author on medical ethics, military medicine, and treatment of detainees

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9/11 Remembrance, A Seven-Part Series on the Five Year Anniversary of Sept. 11, 2001

This seven-part look at a father's story was written mostly by John Napolitano, Sr., whose son, John, was one of the firefighters who died in the attacks on the World Trade Center. We must never forget.

Part 1

A Hero, A Tragedy, and A Father's Love - Originally published in the San Gabriel Valley Weekly in August and September, 2006

A series of articles reflecting on the events of 9/11/01 and the five years that have elapsed since

By Bill Coburn and John V. Napolitano, Sr.

Back in March, 2002, I received a call from my brother, Lt. John E. Coburn, Jr. (we call him Jay). He is a paramedic in the Matteson, IL Fire Dept., and a member of the International Assn. of Firefighters (IAFF) Honor Guard for the state of Illinois. He told me that every year in September, the IAFF holds a memorial service for the firefighters who had fallen in the previous year, from June to June. He said that because of the World Trade Center bombings in Sept. 2001, there had been very few who had been able to attend that year's service, because the planes were grounded. I learned later that only 13 families were in attendance out of 74. So in 2002, the IAFF was planning to re-honor the fallen of 2000, in addition to the 343 dead from the World Trade Center, and the other 82 fallen from 2001. "Bill, I lost 400 of my fireman brothers this year, and I'd like to have my blood brothers with me there when we honor them if you can make it." It's not every day that you get an invitation like that. And I feel sure I'm speaking for thousands of firefighter's families around the country when I say thank God that it's not.

So in any event, I knew that I'd be overcoming any obstacles in the way, and that I'd be going to Colorado Springs in September for the memorial. When I spoke with my brother Pat, he told me he'd gotten the same call. Before long, a plan was formulated, and while it didn't actually get finalized until September, it came to pass that Pat and I joined my brothers-in-law Wayne, Joe and Jim, and we hopped in a motor home for a trip to Colorado. The trip was an eye-opener in numerous ways, and the kind of trip that causes one to reflect upon one's life, one's goals, one's choices, and how they reflect upon oneself, as well as the lives, goals, and choices of others. In short, it was thought provoking, it was moving, it was difficult, it was emotional, it was sad, it was uplifting, it was an amazing experience, and I'm glad I went.



But one of the most important things that happened on this trip was to lead to a cross-country relationship with an amazing man, who in turn is the father of an amazing man, a true hero who died in the World Trade Center bombings. A man who was a hero long before that tragedy struck, through his everyday life as a firefighter in one of the elite firefighting units in the country, Rescue 2 in New York City. This article is one in a series of articles continuing through the five-year anniversary of the 9/11 "bombings." It will take a look at a father's love, and how that father has coped with the loss of his son by continuing to communicate with that son through letters written on milestone dates such as Christmas, Father's Day, the anniversary of the bombings, and his son's birthday, which, coincidentally, happens to be on the Fourth of July. And the final entry will be a first person accounting of the five year anniversary ceremony held at Ground Zero this coming Sept. 11.

In this series, you will be given a chance to see the father's reflections on what has happened, his feelings about what has happened, and those who caused it to happen. I believe that you, too, will find this series to be a look into the mind of an amazing man, and a moving tribute, not only to his son, but to all the heroes who died that day, and those who survived but continue to toll in the first line of defense, as law enforcement agents and firefighters. A rare look into the depths of the feelings of a father's love.

I recognize that there were more than 3,000 who died on 9/11. I do not mean to diminish the deaths of the civilians who were killed, the policemen and Port Authority members, or the military personnel who died at the Pentagon, or the loss that was felt by the thousands more who were touched by their passing. I do, however, have a personal involvement with the firefighters who gave their lives, and for that matter, those who did not give their lives, but helped to save thousands more lives, and preserve civil order, by their efforts on 9/11/2001. That involvement is with the first line of defense, police officers and firefighters, including my brother, Jay, who is currently a paramedic in Matteson, IL, and former trainer of Air Force firefighters. It also includes my brother in law, Bob Burnett, a 22 year veteran on the Sierra Madre Fire Dept., as well as numerous friends who serve as firefighters with SMFD and other departments, and as police officers with SMPD and other departments.



At the Memorial, there were many moving tributes, but the New York wall, dedicated to the 343 firefighters who died Sept. 11, 2001, was overwhelming. There was a program from a funeral service. I opened it, and when I began to read the first quote, I just completely lost it and had to stop reading. It began "Surprise, Grandpa, I'm here! I wish I had been able to meet you..." It went on, but when I looked and saw the child's name, and the note that the child was 20 days old on the day of the service, and then read the names of the other signers, at least one of whom was also a grandchild, I knew I couldn't read any further. This was after seeing a photo (click photos to enlarge) of ashes at the wreckage, in which had been written the words: "Rescue 2 - John Napolitano, I'm here and I love you, Dad." Below that was a sketch of a firefighter with a letter, written by that father.

Now I have to confess that I didn't do a very good job of re-telling that experience when I put a section on my website that was about the IAFF memorial service, and I'm kind of glad I didn't, because it was because of a desire to correct the information that John V. Napolitano, Sr., contacted me after Googling his son's name and discovering my pages about the IAFF memorial. And that occasional "pen pal" relationship has continued through the years, and is the subject of this series.

A little background on Lt. John P. Napolitano, Jr.: John joined the Lakeland Fire Dept. in Ronkonkoma, NY, at age 17, and



worked his way up to eventually become the Chief and Commissioner. He then was accepted to Rescue 2, an elite firefighting unit based in Brooklyn, NY. At the age of 33, he was the youngest member of the squad. Prior to Sept. 11, he had taken the examination to become a lieutenant, and his family was informed after his death that he had passed. He was promoted posthumously on Nov. 1, 2001. He leaves behind his wife, Ann, and two daughters, Elizabeth and Emma Rose. Since his death, the street where he grew up has been renamed in his honor, and the Lakeland Fire Dept. has built a new Firehouse, which has been named for him. His father John, Sr., spent time as a policeman in New York.

Here is the text of the letter by which I was so moved at the IAFF memorial that day in 2002:

My beloved son:

I miss you so much sometimes the anguish is unbearable. But I think of your strength, courage and having known firsthand your profound heroism, you give me the strength that I need to continue and to be there for your family as best I can.

You would be very proud of them, Son. Ann is giving the girls all the love and support that they need, and will not allow a broken heart to get in the way. Elizabeth and Emma miss their Daddy and cry for you, but even at a young age, they seem to know how to pull it together and be there for their Mommy. Your three girls are doing you proud, and although their hearts are broken, their spirit is strong, and their love for you is the cement that holds them together, and nothing will tear them apart. That my Son, I can promise you.



I was so lucky to have you, not every father is fortunate enough to have a son that he could look up to. You dedicated your life to helping people and saving lives, you demonstrated at an early age a maturity and profound sense of decency not found in a great many people. You took your profession very seriously but not yourself. You had a great sense of humor, and it was deeply appreciated by your friends, and so was your love which you gave so freely.

Your friends miss you so much my Son, they (unreadable) you so, and my heart breaks for them. I visit from time to time with your fellow firefighters, and when they speak of you, there is a (unreadable) and they all say the same thing, that you were special, and I understand, because for me my Son, you always were and always will be special. Our time together was too short, and my anguish is unrelenting, but with all the anguish and the pain, I would endure it again and again, because having you was a beautiful gift, and it would have been a far greater tragedy to never have had you at all. I walk about the house and the memory of you is overwhelming. I see the great man that you grew to be, but I still hear the childhood laughter. The squirrels in the attic that you tried so hard to catch for me, are gone. It's as if they know that you are not here, and the game is over. Perhaps they cry too. I wish that they would come back so that I could hear the childhood laughter. The squirrels in the attic that you tried so hard to catch for me, are gone. It's as if they know that you are not here, and the game is over. Perhaps they cry too. I wish that they would come back so that I could hear the childhood laughter.

maybe you would hear them, and you would come back to catch them, and I can see you again. I will never say goodbye to you, my Son. I will be proud of you forever, and love you always.

Dad

Up next, a look at the letter I received from Mr. Napolitano, in which he recounts the events of 9/11/01 and his search for his son at Ground Zero.

Part 2

A Hero, A Tragedy, and A Father's Love

Second in a series of articles reflecting on the events of 9/11/01 and the five years that have elapsed since, through the words of one victim's father

By Bill Coburn and John V. Napolitano, Sr.

In the first article in the series, I told you about having traveled to Colorado Springs with members of my family to join my firefighter brother at the memorial for the fallen firefighters of 2001, including the 343 who died at the World Trade Center. I introduced you to Lt. John P. Napolitano, through a letter written by his father in January of 2002, which had been displayed at the memorial. An entirely new wall had to be built for the 9/11 fallen, as the existing wall was not designed to deal with that many casualties.

During the ceremony, it took 19 minutes to read the name of the fallen firefighters, from the World Trade Center alone. I decided to post some of the photos and some of my thoughts on the experience, and due to some factual errors, I was contacted in mid-2004 by Lt. Napolitano's father, who filled me in on the actual events of that day. While the following letter is out of order chronologically for the series, I felt that this was the best place in the series to put it, because it gives a description in Mr. Napolitano's own words about what happened that tragic day in 2001.

Dear Bill,

My name is John Napolitano, and I am the father of Lt. John P. Napolitano from Rescue 2, FDNY. I wanted to send to you a clearer version of my tribute to my son and tell you how it came about.

I had some time as a NYC Cop and got to the World Trade Center on the morning of 9/12/2001, to search for my son. With me was my best friend from childhood, Lenny Crisci. He retired from the NYPD, we grew up on the same street in Brooklyn 5 houses from each other. We were searching also for his brother John also from the FDNY, and three of my son's friends from our neighborhood, one Police Officer, and two Firefighters. My son John went to school with two of them and all of them volunteered their time with the Lakeland Fire Dept, from which my son was once Chief of the Dept, and then Commissioner.

Lenny and I were overwhelmed by what we saw, and like many that were there will taste the ashes forever. I still see myself climbing on the debris, not knowing where to look, but looking through twisted steel and calling my sons name, and hoping to hear him call back to me. "I'm here Dad! I'm here!!" I would try so hard to hear that... and when it didn't happen, I would cry... maybe if I yelled louder.

Lenny and I would ask the Firefighters that were there if they knew anything about my son, or Lenny's brother, or my son's friends... but they could only shake their heads, and look down... the pain in our eyes, only adding to the pain in theirs... at some point at a Triage area, I wrote with my finger in the ash on the wall a message to my son... I wrote... "Rescue 2 John Napolitano I'm here and I love you Dad". The Firefighters treated my message to my son as a shrine, and some have told me that whenever they would collapse near it from exhaustion, that they would look at it, and put their helmets back on and go back to the "File"... and in the days after I wrote to my son, Firefighters and Rescue Workers from all over wrote messages back to me

to let me know that they were there, and to not give up "Hope"

That day on Sept 12 near a Fire Truck, under a steel beam, Lenny and I found the body of a young girl...she was wearing a sundress, and covered with gray ash... this was somebody's "little girl"... somewhere people were worried about her and missing her... my heart was so broken...she didn't deserve to die like this... and I didn't want her to be alone... Lenny and I made a cross from scraps of wood and we stood it near her and said a prayer... I will never know her name and her family will never know that someone prayed for and loved their baby... but after we alerted nearby Rescue Workers and moved on... I thought that if my son was gone, and found by someone... that they would pray for him... and even if for a little while... love my baby

I had the very best Son...and for 33 years he gave me the most wonderful adventure

It has been said that it is not the destination that matters but the journey...and although John reached his destination too soon, and his journey was much too short...John's journey was magnificent...and watching the chapters in my Son's life, living his dream to help others...being a devoted husband and father...a loving and caring brother...a trusted and good friend to so many...and to his Mother and me...the very best Son...he has made my journey Magnificent.

John Napolitano, father of Lt. John P. Napolitano, Rescue 2 FDNY

Going back in time, now, here are excerpts from a letter written by Mr. Napolitano on July 4, 2002, the day his son would have celebrated his 34th birthday. Just less than a year after the bombings, Mr. Napolitano was in a very reflective mood, looking back on the birth of his son and the atmosphere in the country at that time in 1968, his son's childhood, teens and his career. He also discusses the trip he made with his daughter-in-law to clean out his son's locker.

My Son, I love you, and I miss you so much. Today is your birthday, and all week as this day was approaching, I knew that it would be an emotional day. Well Son, emotional would be an understatement. You would always jokingly say, "toughen up", and I tried my best to take your advice, all day I thought about so many things, starting from the day you were born. July 4th, 1968, they were difficult times, I was a young soldier in an Army that no one appreciated or respected, the country was divided, and words like Honor and Patriotism did not seem to exist in the English language. We were at War with others and sometimes with ourselves, everybody had a different opinion as to what it meant to be an American, we were a house divided.

Then you were born, and although the times were confusing one thing that I was so certain of, was that I was so happy to become a father, you made me so proud. But that was just the beginning of so many things that you would make me proud of. I remember the first time I saw you as I pressed my face up against the glass at the hospital, you seemed to look right at me and you smiled that beautiful smile, that I see to this day. I had a Son, and I just met the man that I would respect and admire the most in this world. I sometimes think of the irony about the day that you were born, a 4th of July baby, Independence Day, born during troubled times, and 33 years later, you would become part of an extraordinary group of Heroes, who showed the World, during a cowardly attack on unarmed civilians, profound courage. Heroes who met evil head on with Professionalism, dedication, and compassion, and a courage so great that it has inspired all Americans, and has united this Nation in a way that we have never been united before.

You were a good baby, you slept when you were supposed to, you were up and about when we were, you ate whatever we gave you, and although you cried sometimes as babies do, it seemed that you only cried until your point was made, and then you stopped, and then you would smile that beautiful smile, that I miss so much. You were a good child and a good teenager, you excelled in school and were a member of the National Honor Society. I always waited for the other shoe to drop. It never did. You also were an excellent artist, you could draw anything, I envisioned so many professions that you would master. One day I came home and saw Fireman's gear in the house, you became a Junior Volunteer at the Lakeland Fire Department, a hobby I thought, a passing fad. I was wrong, you had found your calling, you loved people and didn't judge them by size shape or color, you had respect for others and wanted to save lives, when someone was in trouble you didn't pause to find out if they thought the way you did, or prayed to your God, to you it didn't matter, all life was equal, and you were going to give it your best to save them.

You moved up at a steady pace with the Lakeland Fire Department, while also becoming a New York City Firefighter. You served two Fire Departments, and two communities with professionalism, integrity, and courage. You became a Lieutenant, a Captain, a Chief, the Chief of the Department and then one of the Commissioners for Lakeland, and you were awaiting your promotion to Lieutenant with the FDNY, you married your High School sweetheart, and together you both brought two beautiful little girls into our lives. I was so proud of you. Then the other shoe dropped, Sept 11th and the World stood still, a terrible attack against innocent people, they were trapped under horrific conditions, but you and others did not stand still, the towers were mortally wounded, and even though you didn't know when or where the next missile containing innocent victims would strike, you and the other heroes rushed in, you all were towers of courage, you all saved so many lives, you were the eyes for those that could not see, legs for those that could not walk, and you were hope for those that were in despair and had no hope. The towers came down and in seconds hopes and dreams were shattered.

The time came when I went with your wife to get your belongings from your locker, we went to Rescue 2 and met with your Captain, and your friends, they were so sad and offered to help, but this was something that your wife and I wanted to do. We went upstairs and out of all the plain lockers yours stood out. You had pictures of family all over the place, and drawings from your little girls, when we opened the doors there were more pictures, and drawings with notes, "Daddy I Love You". All your uniforms were pressed and hanging neatly, we took the notes and pictures down and gently removed your shoes and your uniforms and cried. On the shelf was your watch and a necklace with a medal of a Saint that your wife gave you, I know that Firefighters don't wear metal while they work because of the heat, I didn't see your wedding ring and I asked Ann if she had it, and with tears in her eyes she told me that it was still on your finger that you would never take it off, and I understood. Your wedding ring was a symbol of the love that you had for your wife and your family, and you would not take it off.

I see the boy and the good and decent man, and today is your birthday, Independence Day, and while others celebrate the birth of a Nation, and though my heart is broken I am so grateful to celebrate the birth of my Son. You will always be my Son. I will close my eyes and see you, I will remember our games at the Park, the trips to the Zoo, I will remember all the things that you did to make me proud, and I will remember your courage, the courage to work hard, to be a good and decent man, the courage to not take the easy way out, the courage to stand up for what you believe in while still being respectful of others. I wished you thirty three Happy Birthdays, it wasn't enough. I want to wish you so many more, but they were Happy for me, you were and always will be everything that a Father could hope for in a son. Happy Birthday, my son. I love you.

Dad

Part 3

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Second in a series of articles reflecting on the events of 9/11/01 and the five years that have elapsed since, through the words of one victim's father

By Bill Coburn and John V. Napolitano, Sr

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My Beloved Son

I love you and I miss you so very much. It will soon be a year without you and time in its harshest sense makes me feel every minute of it, and yet it seems like only yesterday that we got the call, telling us that you and others that we know and love were missing. It started with me searching for you in that horrible rubble that not you or anyone else deserved to be trapped in. I climbed over twisted steel peering into holes and calling your name. Sometimes I couldn't stop the tears and it would be hard to see, and I would get mad at myself and I would tell myself to stop it, that if this was reversed you would be focused and you would find me. In time the holidays came, one more difficult than the other, everybody trying to be strong for somebody else, your friends loving you and missing you so much. I can see the pain in their eyes and my heart breaks for them. Your wife Ann being the best Mom that two little girls can have, and even though they sometimes cry for their Daddy, they somehow "toughen up", and pull it all together for their Mom, is that you whispering in their ear? Your "Three girls" are doing you proud Son, their love for you, and the love that you had for them will be the cement that will bind them together, and nothing will tear them apart, that my Son I can promise you. Father's Day was a rough day for me. I saw the great man that you became, the good and decent husband and father. I missed buying you a gift, I missed hearing you say to me "Hi Dad Happy Father's Day". Time goes by and another hard day was your birthday, I remembered the day you were born, July 4th 1968, 8lbs 4 oz. I was so proud to become a father, all your life all you ever did was make me proud and happy. I remember the firmness of your handshake, but I can still feel the child's hand in mine when I took you to the park or the zoo. I close my eyes and I can see your smile, but I can still hear the childhood laughter. They were good times, you were and always will be the best son that a father could hope for, time went by too quickly, thirty three of your birthdays were not enough. I wanted so many more. Another time has come that is happy and sad. You have a new nephew, your sister Dawn had a beautiful baby boy. She named him John after you, she misses her big brother and wishes you were here to share this beautiful moment. I have a new Grandson that I love, named after someone who had compassion, decency and profound courage, someone who loved people so much that you gave your life to save them. I am sad that your nephew will never know you, to see you smile to hear your laugh, to know your great sense of humor, to be picked up in your arms and to be loved by you, but I know my son that you will look out for him, as you look out for all of us. I will tell him about you, and why he should be proud of his name, I will tell him not only of your courage, but how good and decent you were, all the funny stories and I guess when he gets older some of the sad ones. Time has given me in some ways a tough but bitter-sweet job, but one I do gladly, because it is my job to honor you, and as long as I live to keep your memory alive, to keep alive the memory of your courage and the courage of all the other heroes that went with you. When I hug your little girls it will be you hugging them through my arms, and when I take them to the park or the zoo with their little nephew, and I hold their hands, I will always leave a little room for yours my Son. I will tell them how much you loved them, and I will always tell you that I will be proud of you forever, and I will love you even longer.



The next letter was written the day after the one year anniversary, Sept. 12, 2002. In it, John Sr. talks about his trip to the Ground Zero first anniversary memorial ceremony, which he attended with his childhood friend from down the street. Lenny Graci lost his brother, an NYPD officer on Sept. 11, as well. Here are excerpts from this very emotional letter.

Your Dad:

My Son it has been a year since you were taken from us and I have felt every second of every day of it. Rescue 2 had a quiet Church ceremony and then the families and firefighters returned to Quarters to be together. The Lakeland Fire Department had a ceremony at the main building to honor you and the present and past members of the Department. I wrote them a letter thanking them for their quick response to the World Trade Center that day and for all the other days that I saw them at the Site, side by side with the FDNY and other Fire Departments and Rescue Workers from all over the Country, searching for all you Brave Heroes. You all were the first Patriots of the 21st Century. History will record your Heroism and your name, it will document all the events, and the story will be handed down from generation to generation. As for me, your memory will be with me forever and ever, till the end of time.

As you probably know I spent the day with Lenny at Ground Zero. We retraced our steps from a year ago. First we went to Tower 2 the South Tower. We laid flowers and we placed Lt. John Graci's picture on some concrete that is still there, I placed your picture next to him. Lenny then wrote his name just like he did that day, and then I wrote on the concrete the same message that I wrote in the ashes that day with my finger, "Rescue 2 John Napolitano I'm here and I love you Dad." After a time I told Lenny that I was going to Tower 1 the North Tower, the Tower where you were Lost, and to meet me there in a while. It was a very windy day and the earth from the ground was swirling all over, as I walked across the field I put my head down as the wind picked up and as I looked at my feet I saw that my shoes were covered in dirt much like they were covered with ashes that day. A lot of people held handkerchiefs to their face and held their hands over their eyes because of all the flying dirt and debris. I thought to myself how symbolic it was, even though it was nowhere near the debris and dust cloud that day a year ago, it was as if someone wanted everyone to know what it was like. They were announcing everyone's name that perished that day all the Victims, and all the Heroes that tried to save them. I stopped just before I got to the North Tower and I heard your name. For me it wasn't loud enough I wanted to shout it to the World. I got to the footprints of the North Tower, there were flowers and pictures everywhere left by family members who had lost loved ones there, Mommys and Daddies just like you, Brothers, and Daughters and Sons, just like you. I looked at all the faces, there were civilians, and Police Officers, and Firefighters, smiling faces looking up at us but no one was smiling back. Instead there were tears. I held your picture in my hand and I looked at it for I guess a long time and I decided to not leave it there, instead as I turned to leave the Pit and walked up the long ramp leading to the street, I held your picture over my head for everyone to see, some saluted you. I was finally carrying you out of the pit. I do not know what they are going to build over there, a memorial certainly, perhaps some buildings, there will probably be benches to sit. In time people will sit there, maybe feed the birds, there may be children running and playing, and laughing, and I guess that will be okay, and I'll go also to visit and I may sit for awhile, and maybe some day I will not see all the twisted steel, it's not

important, but one thing that I do know is that I will always see you, and the laughter that I hear will be yours. I love you my Son.

Dad.

Part 4

A Hero, A Tragedy, and A Father's Love

Fourth in a series of articles reflecting on the events of 9/11/01 and the five years that have elapsed since, through the words of one victim's father

By Bill Goburn and John V. Napolitano, Sr.

In the first article in the series, I told you about having traveled to Colorado Springs with members of my family to join my firefighter brother at the memorial for the fallen firefighters of 2001, including the 343 who died at the World Trade Center. I introduced you to Lt. John P. Napolitano, through a letter written by his father in January of 2002, which had been displayed at the memorial. In the second article, I brought you a letter that John's dad, John Napolitano, Sr., had written to me after he discovered a section of my website that discussed his son. We've also taken a look at letters written by John Sr. to John Jr. on what would have been John's birthday, and letters written just before and after the first anniversary of 9/11, including John Sr.'s description of the first anniversary memorial service at Ground Zero.

In the following letter sent to me by John Sr., he discusses the manner in which John Jr.'s daughter's were handling the loss of their father, and the pride he felt that a section of a county road was being renamed in his son's honor.

"Hi Bill and thank you so much for remembering my son, knowing that there are people like you out there who will always remember the innocent victims, and the Heroes that were lost trying to save them, make difficult days a little less difficult, and it's OK to use anything that I sent to you about John.

John's daughters are doing well, but at times they have their moments. As you know John was also a member of the Lakeland Fire Department, and the Firefighters at the Station that was his first command, and where he started as a Firefighter, John was to eventually become the Chief of the Dept and then Commissioner, have John's gear encased in a glass and wood cabinet that is bolted to the wall at the entranceway, and on the shelf above his bunker gear is his helmet with two electric candles on both sides that are always lit. one day when I was visiting at the Station I had John's little girls with me, and while I was talking to one of my son's friends, I heard the youngest, Emma, say to her sister, Elizabeth, "I saw Daddy's costume. I miss him" and she started to cry, but before I could get to her and console her, the "older" sister stepped up to the plate and told her that everything would be OK, and put her arm around her. I thought to myself that if my son could look down from Heaven, I know that he would have had a smile on his face... and he would have been proud.



There have been many ceremonies and Street dedications throughout New York for our Nations First Patriots, and the Street where I live and where John grew up carries his name also, but on September 25th, there is going to be a County Road dedicated to John for what he was to so many people, his dedication to the communities that he served, and the Heroic way that he lived. The first bill signed into law by the newly elected Suffolk County Executive Steve Levy, was to dedicate and rename "Motor Parkway" in Ronkonkoma NY, "LT John P. Napolitano Parkway."



As for me Bill, I'll always see the twisted steel, smell and taste the ash and the dampness, and perhaps that is the way it should be, but it is a small price to pay for the memory of my son, I will always see the little boy... and I will always see the Great Man... he will be with me forever.

Again... thanks for Remembering

John Napolitano, father of LT John P. Napolitano, FDNY Rescue2



John Sr. also makes a point of remembering his son on holidays. Here are excerpts from a letter he wrote to John Jr. on Christmas of 2002, in which he describes how much he misses seeing his son with the grandchildren as they open their presents, but then accepts his loss by remembering all those who were celebrating this day because of John Jr.'s heroism, both at the World Trade Center and throughout his career as a firefighter.

My Son, I love you so very much, and miss you beyond description. Today is Christmas, and I miss so much seeing your face as your little girls would open their presents, watching their eyes open wide with joy, and then watching yours open even wider. I missed shopping for you, but when I went into different stores I would look at some of the things that I would have liked to have gotten for you, and tried to imagine the look on your face as you opened your presents, I would see that smile of yours that breaks, but still warms, my heart. I went to different places where there were ceremonies for you and your friends, and I would look at your name carved in stone, and I would touch it and then kiss my fingers, and hope that my kiss would reach you in heaven. Your friends miss you so much my Son, my heart breaks for them, I wish that I could carry their pain, it would be such a small price to pay for having had you. Any sorrow or anguish that I have pales compared to the joy that you have given me over the years, so don't feel sorry for me my son, if I felt a million times more grief it still would not be a fair price to pay for having had you. I was so lucky and blessed; you were, and always will be the best son that a father could hope for. Your Heroism has made it possible for others to enjoy another Christmas as a whole family, and I know that would have made you happy. I know that if we could hear you, the message would be for us to not mourn or cry, suffer or worry about you, and we are trying our best to respect your wishes, but forgive us if every once and a while, if we stumble, or just want to spend a moment alone and ask why... I will always be proud of your Heroism, and of those that were with you... but the thing that I will always be most proud of is the man that you are, the loving and decent husband and father, a hard working man who provided the best that he could for his family, your respect for others, and your many accomplishments in the FDNY, and the Lakeland Fire Department. You were a true role model in every sense of the word, and you were and always will be a man that I am proud to look up to. I said the man that you are, because my son for me you are in my each and every thought. I see you every

where, I hear your voice, your laugh, and I see your smile, for me you will live as long as I do, and when my time comes your face will be the last that I see...and perhaps the first that I will see again. Until that time comes I hope you have a Merry Christmas in Heaven and I want you to know that the thought of you makes my Christmas a little merrier here on Earth. I Love You.

Dad

Father's Day for a child who has lost a parent is a very difficult time, but it's also difficult for the father who has lost a son. In the following letter, written on Father's Day of 2003, John Sr. discusses the effect of the loss on the Napolitano family.

My Son I miss you and love you so very much...today is Father's Day, and although it's a little tough on me, I am so grateful for all the wonderful memories, and I can still hear your laugh, and your voice calling me Dad...But I think the thing that I am most grateful for was the opportunity to see what a great Husband and Dad you were; I can promise you my Son there was none better.

I cherish the time that I spend with your little girls, and they love you so much my Son. Sometimes when I'm driving, Elizabeth will tell stories to Emma about different things that she did with you...her memories of you are so very sharp, and Emma listens to every word, and asks for more. Elizabeth especially likes to tell the story of the times you took her to the Firehouse, and of rides in the Fire Truck...of fishing adventures, when she would catch a big fish...and how you would set it free, something she doesn't understand...but I do my Son. I think it had something to do with you having a soft heart. As for me this Father's Day I will remember all the trips to the Zoo and the Aquarium, going to the Movies, and pushing a little boy on a swing...I will always feel your hand in mine...I will remember every day like it was yesterday...seeing that little boy grow into the most wonderful man that I have ever known...a good and decent man, and the greatest Father. Yes Son I have my memories...and because of them I am the luckiest Father in the World...thank you my Son for all the wonderful Father's Days. And to you my Son, Happy Father's Day. I love you.

Dad

And still another letter, written on John's birthday (the 4th of July) in 2003, in which he describes a special moment with his son's family and asks a favor....

My Son I love you...today is your birthday and we all are missing you so much...your Mother has been tormenting all week...so is your Wife and your two little girls, and your sisters...it is so very hard...I wish that I could carry all their pain...but I promise you Son that we will try very hard to have some of your courage and hang in there. I do have one favor to ask of you, Ann saved all the messages that you left for her and your daughters whenever you were at work telling them how much you loved them. She saved so many...well Father's Day, Elizabeth was sad, and when Ann asked her what she was thinking, she said that she "was forgetting Daddy's voice" so Ann, Elizabeth and Emma sat on the floor and listened to all your messages...you made their day Son, you came through for your "Girls". Well, for that favor...if you could once in a while whisper in Elizabeth's ear, it would make her so happy.

Today is your birthday and we are thinking about what might have been...I probably would have bought you boots...like I did every year. I know that it was kind of a joke in the family, but I know you really enjoyed them. After 9/11, seeing a pair of your boots on your front porch was very hard, but still a welcome sight. I guess we all are going to be thinking about what gifts we would have bought you on your birthday...but the truth of it son is that your birthday will always be a reminder that you were and always will be a Gift to us...the Greatest Gift. Happy Birthday Son.

Dad

Part 5

A Hero, A Tragedy, and A Father's Love

Fifth in a series of articles reflecting on the events of 9/11/01 and the five years that have elapsed since, through the words of one victim's father

By Bill Coburn and John V. Napolitano, Sr.

In this continuing series, I told you about having traveled to Colorado Springs with members of my family to join my firefighter brother at the memorial for the fallen firefighters of 2001, including the 343 who died at the World Trade Center. I introduced you to Lt. John P. Napolitano, through a letter written by his father in January of 2002, which had been displayed at the memorial. In the second article, I brought you a letter that John's dad, John Napolitano, Sr., had written to me after he discovered a section of my website that discussed his son. Since then, we've taken a look at the world of a father who lost his son, and the emotions that have played a part in his life since then. John Sr. calls the firefighters and policemen who died at the World Trade Center the first patriots of the 21st century. We've been with him as he recalled his son's childhood years, into his career and the family that he loved so much. We've seen John Sr. remember his son on his birthday (coincidentally, this 1st patriot of the 21st century was born on the 4th of July), on Father's Day, and during the holidays. With this article, John Sr. shares with us some memories from the Ground Zero memorials held on Sept. 11th, including a serendipitous meeting on more than one occasion with a friend of his son's, and he discusses the anger he feels about the events of 9/11 (you will be surprised) and he tells us what he would say to those who condone or commit acts of hatred.

I received this letter on Sept. 11, 2004.

Hi Bill...thank you so much for your kind words, but especially for the place in your heart that you have reserved for him...and all the other Heroes.

Today Lenny and I went to the "Site", as we will every year. We held my son's and his brothers' pictures high above our heads, and listened to the names over the loudspeakers, waiting for our "guys" names to be said. We looked at all the other people and the smiling faces on the pictures that they held high, and they too were waiting for a "name" to be said loud, and just when I think that my heart cannot break any further, I look at all the sorrowful faces...and prove myself wrong.

At the first anniversary as Lenny and I were walking in the crowd, Lenny called my attention to a Firefighter who had my son's picture in his hat. He was tall and with his head high my son was elevated above everyone...I squeezed my way towards him, he was with his wife and both looked so sad,

when I approached him I pointed at his hat and said, "thanks for carrying my Son". He looked like all the air came out of him as he looked at me, and I grabbed him to hug him and he held me as tight as he could, and he broke down crying and he said to me, "Mr Nap. I loved him so much. I loved them all. but John..." I told him I understood, soon we were all crying. Lenny, me, the Firefighter, his wife. We all proceeded down the ramp to where the Towers once were to complete why we were there. This Firefighter had once been a member of the Lakeland Fire Dept and was a good friend of John's, he followed John into the FDNY, having started in 1994, four years after John.

After the ceremony I hugged him goodbye, and told him that I would see him next year. When next year came, even though it was very crowded, as Lenny and I were walking towards the ramp, an emotional day became more emotional as I again met up with my sons friend... we smiled... we hugged... and then we cried... and as I held him I said in his ear that it was OK to be sad today... but that John would want him the rest of the days to be happy... to love his wife and kids as much as he could... that this I know is what my son would want... we went down the ramp, to be where we belonged, to be near those that we love, those that we will forever honor... and when it was time to go, we said our goodbyes, and I said, "I'll see you next year".

The World Trade Center site, is much more "sterile" now, but as Lenny and I walked with the crowd we both still see the "debris field", we held pictures high for those to see the faces of Heroes, I think maybe to also share our heartache. I was approached by a New York TV News Team. I was asked if I have any anger... without hesitation I said that "My anger is that, in this day and age, with all the spectacular things that Humankind can do, with all the goodness that is in us, that there are people that are filled with so much hate and rage at those that don't think the way they do, or don't pray the way they do, that they are willing to sacrifice themselves just to know that they killed and made them suffer... them and their families." To those people who would commit, or condone, acts of hatred, I say this... that although the world saw on September 11, 2001 such an act of hate... they also saw acts of Compassion, Professionalism, and Profound Courage, and it is these acts that the World at large will forever remember and embrace.

The crowd was very thick this third anniversary, but not too far in front of me was a tall familiar Firefighter, I pointed him out too Lenny and got through the crowd to him, I came up beside him and put my hand on his shoulder, this time we hugged longer... and cried longer. Lenny caught up and we all slowly made our way down the ramp. I shook every hand of the British "Bobbies" that stood in Honor, and Thanked them for being there. I eventually stood at the footprints of the North Tower, I waited for my sons name... people were laying flowers and pictures where the Tower once stood. I put my sons picture there, and I just stood there looking at him, trying to imagine what he was doing that day... how high up was he... was he tired... was he afraid... and when the steel crumpled, and he heard it coming towards him... did he think of us and know how much we loved him.

I heard my son's name, and again for a moment... time stood still... I put a flower on my son's picture... "I'll see you next year Son... I love you".

I said goodbye to my son's friend he told me that he will see me September 25th for the dedication to John (Editor's note, the dedication was of a section of a roadway that now bears John Napolitano's name). I said goodbye to his wife, and I told her that I know that she is taking good care of her husband, and that I admire her courage, she told me that her husband was looking for me and was asking Security if they could locate me... and that she was happy when I found them... I smiled at her and hugged her goodbye, I know that I will see him next year, and that I won't have to plan on where to meet. My Son will show me the way.

Thank you Bill for remembering.

The following are excerpts from a letter John Sr. wrote last year (2005) on Sept. 11.

My Son, I love you so much. Today, September 11, I again went back to the World Trade Center... not to search, but to mourn... and again Lenny is at my side to mourn also... for you, and his brother... photographs with smiling faces are held high, and below, faces are not smiling but filled with tears. I strain to hold your picture high... I want the world to see the face of a Hero, "This is my Son... Please don't forget Him". I placed photos of your little girls next to yours for you to see... for the World to see... Today is so hard my Son... but I have to be there... and today your sister is going to read aloud your name for all to hear... I wonder if God will let you hear... Your sisters miss you so much. I listen as all the names are said aloud, their smiling faces held high... every year I get to know them better... and I mourn for them also... and now I hear your sister's voice, saying the names of those that you tried to save, and names of those that were also Heroes, and in a firm but fragile familiar voice, I hear your name, and your sister tells the World how much she loves you... and my Heart breaks... and others are crying for their loved ones... and for you... we are all becoming one big family... united in sorrow, bound together by grief.



The World Trade Center is now a building site, but I still see the twisted steel, and smell the damp grey ash that was everywhere... and I close my eyes, and write with my finger once again, on a wall covered with ash, "Rescue 2 John Napolitano I am here and I love you Dad", and it ends... and we slowly leave, tired and drained and we know that we will be back next year.
I love you Son and I miss you... and next year for me is just a minute away... because I see you every second of every minute of every day... and will do so till it is my time to be with you again.
You are forever in my heart my Son
Forever...
Dad

And this letter, written on Christmas, 2005.

My Son, I love you... today is Christmas... your favorite holiday... you loved it so much because it gave you the opportunity to bring happiness to others. I just want you to know Son that you are still bringing us Happiness. All I have to do is close my eyes, and I see your smile. I can hear your laugh, and I can hear your voice... "Merry Christmas Dad".

The Guys at Lakeland still hang your Christmas Stocking, and I know that they always will. The days before Christmas they decorated the Fire Truck that carries your name with brightly lit Christmas lights, and with lights blazing and the Siren screaming and "Santa" sitting on top, they drove through the neighborhood waving to all of those that stood outside their Homes. They slowly came down the street where you grew up, a street that also bears your name... "Lt John P Napolitano Drive". I stood outside and watched, and I remembered how whenever you could, how you used to be on that Truck smiling and waving, and how especially you loved the Children, and I closed my eyes and I remembered.

The Rig stopped in front of the House, as they do every year. Santa waved, "Hello Mr. Nap," and all the Firefighters disembarked, and in single file, walked up to the House, and up the stairs onto the front porch, and each and every one of them gave me a hug... They were hugging you my Son... did

you feel it?

As they said their goodbyes, and walked back to the Rig, I saw you my Son that day in September, as you got off the Rescue 2 Rig with your "Brothers" and walked towards the Towers. I see you stop as you approach and look up at the dangerous and formidable task ahead of you. I know that you thought of all those poor people trapped, and that you would use all of your skills, and all of your Courage to save them. and I know also my Son that you thought of us... your Wife and your little Girls... your Sisters, and your Mom... and Me... this my Son I know.

Christmas is a special time of year... a Magical time... and whether one believes in the true meaning of Christmas or not, its effects still seem to be felt... I wonder why this is only for a day. You my Son carried the Spirit of Christmas with you each and every day, and I think also that if there was a way that you could somehow give a Christmas gift to the World, that it would be that each and every one us would carry with us always, for each and every day, the Spirit of Christmas... you would want this so that no one ever again has to look up and see the Horror of what you saw... so that a Father doesn't have to see his Son in the Shadows, and have to close his eyes to hear... "Merry Christmas Dad"

You will be with me forever... till I see you again... Merry Christmas my Son.

Dad

Part 6 -

A Hero, A Tragedy, and A Father's Love

Sixth in a series of articles reflecting on the events of 9/11/01 and the five years that have elapsed since, through the words of one victim's father

By Bill Coburn and John V. Napolitano, Sr.

In this continuing series, I told you about having traveled to Colorado Springs with members of my family to join my firefighter brother at the memorial for the fallen firefighters of 2001, including the 343 who died at the World Trade Center. I introduced you to Lt. John P. Napolitano, through a letter written by his father in January of 2002, which had been displayed at the memorial. In the second article, I brought you a letter that John's dad, John Napolitano, Sr., had written to me after he discovered a section of my website that discussed his son. In these articles, we've taken a look at the world of a father who lost his son, and the emotions that have played a part in his life since then.

Here, in John Napolitano Sr.'s own words, are his memories of the tragic day and those following it, and his thoughts as we approach the fifth anniversary of Sept. 11, 2001. Next week's column, the last in the series, will be John Napolitano Sr.'s first hand account of the fifth anniversary ceremony at Ground Zero.

Dear Bill:

As we approach the fifth anniversary of that terrible day in September, I would like to take the time to thank everyone who has reached out to the Family of Lieutenant John P. Napolitano and let us know that you have taken him into your Heart, and that you will always remember and honor his sacrifice. People like Sgt. Brian McDonough from the New York City Police Department, and his wife Beth. At "Ground Zero", Sgt. McDonough saw a message written in the ashes by a father searching for his missing firefighter son... "Rescue 2 John Napolitano I'm here and I love you Dad". Sgt. McDonough, a father himself, was so moved by what he saw, that he wrote it down word for word so that, as he later said... "I wouldn't forget". Later that evening when he got home, he showed his wife Beth what he saw, and together they cried. Later Beth and her husband contacted me and told me that they will always keep a picture of my son, and tell their children about him, and that they will always honor him, and I know that they will.

And then there is the Thurston family from Colorado, who at the 2002 Ceremony for Fallen Firefighters promised me that they will always "look after" my Son, and they have. Every 4th of July, John's birthday, every Thanksgiving, every Christmas, and every 9/11 anniversary, they go to the Memorial Wall, where my son's name is etched, and they leave a heartfelt card. Mrs. Bieder from Pennsylvania, who proudly wears a Memorial Bracelet that says "LT. JOHN P. NAPOLITANO FDNY RESCUE 2 9/11/2001". Captain Jeff Pennington, from the Gilbert Fire Department, Gilbert, AZ, and his family, who did a study of John and bonded with a brother firefighter that he never met... Captain Jeff and his family, at their own expense, came to New York to attend a ceremony honoring John, the re-naming of a county road to "Lt. John P. Napolitano Parkway". Captain Jeff still calls me from time to time to see how I'm doing, and even came to my home to spend a couple of days with me. Once while visiting with the guys at Rescue 2, Captain Jeff and I went on two "calls" with them. Captain Jeff was thrilled and beaming from ear to ear. As I rode in the rig I could feel the presence of my son... and I know that he smiled on us.

And then from Sierra Madre, California, there is you Bill, who have embraced my son and kept his memory alive. I thank all of you, and on September 11 when I make my pilgrimage to the World Trade Center, my thoughts will also be of all of you, because I know that on that day, that you mourn also. But I wish to ask of you just one thing, which I will ask in closing.

Recently here in New York there was a dedication to the 343 fallen FDNY firefighters, and one volunteer firefighter, it is an approximately 10 feet high, and 60 feet long bronze sculpture of firefighters and the events of 9/11. The Memorial is attached to the wall of "10" Company, the firehouse across the street from the World Trade Center. When I was talking to my daughter-in-law, Ann, about going to the ceremony, and knowing that she wouldn't be up to it, her and my son's youngest daughter, Emma Rose, piped up and said "I want to see where Daddy was". We were at a school concert. Elizabeth who now "plays" the violin was in the orchestra. Ann asked Emma if she was sure about going, and she said that she was. Ann looked at me to see if I was up for it. I really wasn't, but I said that it would be okay. When Elizabeth joined us Ann and I asked her if she wanted to go, and she did. I knew that this day was going to come. I was going to take my son's "little" girls to Ground Zero.

My best friend Lenny, who was always with me those days in September, as we searched for my son, and his (Lenny's) brother John, would also go to the ceremony, and bring his daughter Christina. We arrived early that day, parked the car and secured our seats. Firefighters were setting up for the

Ceremony, speakers and equipment were being tested for those that would present speeches this day, Lenny and I, as we always do when we are at the Trade Center, were reminiscing. My mind was also elsewhere. I walked to where my granddaughters were sitting. They're getting so big I thought and so beautiful. They were talking to Christina and smiling. Now to take their smiles away. I asked them if they were ready to hear about their Daddy... and others. They said that they were. I told Christina that we would be back; I gave Lenny a silent nod. This one time my good friend would not be at my side. We were each others rock those dark days, but today the rock that I would lean on would be my son. I placed my hands on my Granddaughter's shoulders and guided them towards what had changed their lives forever. As we walked along the security fence to an area where only family members and Authorized Personnel are permitted, the girls were looking at what seems to be a big hole left by some catastrophic meteor. I showed my ID to security, and they opened the large gate and let us in. Once inside this secure area you are struck by the sight of all that has been placed there, from beat-up teddy bears, to badgas, firefighter and police shirts, a helmet of a British "bobby", notes and photographs, of loved ones of the missing. Things that were placed at "Ground Zero". Things that say "I Will Never Forget". Things that say "I Love You".

I took the girls to where you can see the whole "site", to where the Towers used to be. I pointed to where the South Tower once was, and I told them that is where "Uncle Glen" (Police Officer Glen Pettit), "Uncle Pete" (Firefighter Peter Brennan), and "Uncle Billy" (Firefighter William Mahoney), and their "Pop Pop's" good friend John, (Lt. John Cnsd) was. And I gave them a moment to reflect. I pointed to where the North Tower once stood, and I said to the girls "That is where your Daddy was". I explained to them as was told to me by an eyewitness... How the Rescue 2 rig came through the Brooklyn Battery Tunnel and up West Street. Of how the seven members of Rescue 2 geared up for battle, looked up at the enemy before them, and with no fear, but armed with Professionalism, Compassion and Courage, and with a look of Determination on their faces, paused only to give each other knowing glances... and strode into the North Tower to save lives.

Elizabeth and Emma listened to every word, but looked straight ahead, looking at what is no longer there. Their father, his helmet black, his black protective coat, burned and covered with soot. Is this what they saw? Or did they see their Daddy in his shining armor? I explained to them that their Daddy went into battle that day thinking of them, and their mommy... of his mother and me, and his sisters... of all of us. And that he was an excellent firefighter, and that he would do all that he could, use all his skill and courage to beat the enemy. To save all the other Mommies and Daddies. And that he didn't want to leave us. But there was one enemy that he did not know about, and this enemy could not be beat. This enemy was time.

Elizabeth and Emma didn't ask any questions. They stared at the nothingness. Whatever thoughts they had, I know that when they are ready they will ask. I told them that the Ceremony was about to begin and that we should go. We left through the Security Gate from which we entered, and along the fence that surrounds "Ground Zero", I stood between them holding them by the hand, and as we were walking, both Elizabeth and Emma, at the same time, looked over their shoulder, at where the North Tower once stood, and I wondered, was it for a hopeful one last look at their Dad? I looked straight ahead, putting on my sunglasses... like I did so many times when I was with Lenny, leaving the "Pit", not wanting anyone to see the tears.

I have recently volunteered to devote some time with Tribute New York City. It consists of people impacted by 9/11 who share their experiences with those who come to the World Trade Center to reflect and pay their respects. Some are survivors who escaped the Towers, some are family members, or rescue workers, or rescue workers who were fathers searching for their sons. I went on three tours so far, and it is very hard on me, the last four were members of the press. I was asked by a reporter why do I do this, and does time heal some wounds, and I told him that I would explain during the tour, when I am introduced. The tour guide started our walk around the World Trade Center describing the buildings and the building process, as we walked she explained the events of the day, where the planes came from, what floors were impacted, the response from firefighters, and police officers and EMT's. We walk to the World Financial Center, and the Tour Guide this day talks about her cousin who worked for Cantor Fitzgerald, and she speaks of his family... then she introduces me.

The group looks at me like they know that they are going to hear some important things. It is going to be more than what they expected. I tell them what I do for a living, but that I was once a cop who worked in Brooklyn, I tell them that my son was a firefighter assigned to Rescue 2, and how on September 11, 2001 my son was scheduled to be off. Of walking into one of the stores that I supervise, walking to the back loading area and being asked "What are you doing here?" Don't you know they're calling for cops, and ex-cops? We're being attacked". This is how I found out about the Towers being hit. The South Tower collapses. I tell them how I keep on trying to call my son, I knew that he would be going, I wanted to tell him to be careful, not to be a hero. His phone was busy. I keep on trying, still busy. I call my house, I tell my wife that "I can't get through to Johnny", she is crying, she tells me that it is Ann on the phone, that Johnny worked last night... somebody switched with him. That he is already there. I try to get into the City but can't. I decide to head home... figure something out... find out what is going on. The North Tower comes down... my son is not in there... no way. He has people safe somewhere... I know this... he is an excellent firefighter.

I arrive at my son's house first. Ann is sitting on the couch surrounded by her and my son's friends... a tearful smile as she sees me... the girls going on 3 and 6 quietly playing. Ann tells me there is no word. I tell her not to worry, everything will be alright. I go to my home a little more than a mile away. My wife sitting, a blank look on her face, her sister next to her crying, my brother-in-law Cono looking worried. "Listen everybody... everything will be okay." I go back and forth from my house to my son's. It's getting late, traffic should be better, I start to head into the City. Cono wants to come with me. We don't get far. His cell phone rings. Cono tells me to turn around and head home. I ask him "is my Son gone?" "No" he says. "Diane is excited, she said to come right home." I race, through stop signs, through red lights. Cautiously, but quickly, like I was driving a race car. I run into my house. My wife is sitting on the floor, she is being held by her sister Diane, and over and over again my wife is saying "My Baby, My Baby". "No". "No". I hear this in my mind every day. I tell this to my group... I tell them how a woman carries a child inside of her... is the first person to love that child... is the first person to suffer for that child. The child grows up... gets married... has children. But that child never stops being the mother's baby...

I get through to Rescue 2, they tell me that John and every member of Rescue 2 is missing. I tell them that "I'm an ex-cop, to give it to me straight... Should I expect the worst?" They tell me that I should stay close to Ann and his mother. That they don't know where everybody is, that John could be trapped. I go to Ann's house... Her and John's friends are still there, the girls won't go to sleep because Daddy didn't call yet... He always does when he works nights. I asked Ann if she got any other word, she takes me aside and said "Dad, Glen, Pete, and Billy are missing too." I feel my knees buckle, but I have to keep a positive look. "Don't worry Ann. Everybody could be working, and they don't know where they are... you'll see". I go home it's early morning. I call my best friend Lenny. His brother John is missing. Lenny and I leave for the World Trade Center.

I tell the group that Lenny and I go to a Brooklyn precinct, and they help us into Manhattan, we piggy back rides with different police officers, and hook up with the Fire Department, and Lenny and I arrive at the belly of the devastation. We walk through the Winter Garden Restaurant area. We look up at shards of hanging glass 150 feet above our heads... the floor turning to mud from all the ash mixing with water... Ash from the World Trade Center...

And in time realizing some of the ash...is from people. We walk outside and onto West Street. Twisted steel is everywhere...some of it reaching up like fingers... smoke rising. And gray ash like fresh fallen snow covering everything. The sounds of alarms from firefighters not moving... a shrill piercing sound... so many... spots of red that were once people.

I tell the group of moving debris a bucket at a time. Of someone thinking that I was a "Fed" and giving me a piece of the skin from a plane. I found a "Fed" and gave it to him. I climb on steel not knowing where to look, feeling heat from the fires below. Calling my son's name in the dark... listening... listening. Nothing. Lenny and I asking firefighters did they know anything about Glen Pettit... Pete Brennan, Billy Mahoney... John Crisci... John Napolitano. The sadness in their eyes. I write a message to my Son, in the ash... still warm. "Rescue 2 John Napolitano I'm here and I love you Dad"

I tell them how I said to Lenny that if I can find my son's truck... "maybe I can find him", then I see what looks like a rescue truck. I climb, run, over the steel, Lenny following. It's a ladder company truck, almost broken in two, I say to Lenny... "there might be firemen here"... and as we look... we see under a steel beam a young woman. She is dead, the beam across her head. She is wearing a sundress, and she is covered with that gray ash, except for a small patch of blue from her dress. I have two daughters, and as I looked at this Sweet Angel, I thought that this was somebody's "Daddy's Little Girl"... and could she be a young mother and back home her baby is missing her and crying for her. Which one of the many "missing" posters was she? This baby did not deserve to die this way. Lenny and I made a Cross out of the debris, and prayed for her... and for her family, we loved her. I alerted some passing rescue workers of this young girl... and moved on. Whenever I think of my Son, I think of her... that is the way it should be.

I tell my group about the messages written back to me, from firefighters, police officers, and other rescue workers: "Mr. Napolitano I know John. If anyone could get out of this, he can...". "Mr. Nap don't give up hope". "Bravo Company was here...". Lenny and I stood and saw the dead and what was left of the dead being removed. In the days that followed, Lenny and I would go down there with renewed hope. Today I will find my Son. He will climb out of some hole that nobody thought to look. His helmet and coat will be covered with that gray ash, his face will be dirty... but he will be alive. And I will dust him off, and wipe his face, and I will hug him, and I will bring him home to his girls. "C'mon Johnny, lets go home, your wife and your daughters are waiting... your sisters too... And your Mother is worried."

I tell my group about the day that they found Lt. John Crisci, the day they found police officer Glen Pettit, the day they found firefighter William Mahoney... that still missing is Firefighter Peter Brennan, and still missing is my Son... Lt. John P. Napolitano.

I also tell them about John's Journey, how he was so good all his life, not only a good son, but a good student, and a good friend, how he would walk to school and home from school a schoolmate that was overweight, to make sure that no one picked on her. How he helped other kids in the neighborhood with their schoolwork, always with a smile, the young man who decided to devote his life to helping others. How he inspired others not only to being a good firefighter, but to being a good husband and dad. I tell them about the 5 year old girl whose life he saved, the daughter of a firefighter. I tell them of him crawling about in a collapsing building saving trapped firefighters. I tell them of one of those firefighters dying with John on September 11, 2001. I tell them of all the good things that John has done to be a better person to help others achieve their goals. My son's journey may have been short. But it was magnificent... and in seeing all the pages of my son's life he has made my journey magnificent.

Back home, Ann had to tell Elizabeth and Emma about their father. They thought that they had done something wrong because it had been a long time and... "Daddy didn't call". Ann told them, as best she could to a 3 year old and a 6 year old, about bad people hurting other people, and how their Daddy went to save some other little girls, and little boys, mommies and daddies, but that he couldn't save them all, and that... he couldn't save himself. That they will not see their Daddy anymore... because he is in Heaven. Emma and Elizabeth cried, their little hearts, so filled with love for their Father, broken. Ann hugged them and told them, to never forget that although they had their Daddy for a short time, that they had... the very best Daddy.

Those early months, I would have the Honor from time to time to baby-sit for my son's little girls. They were so much like him. Emma kind of bold... a sense of humor... Elizabeth, thoughtful, a quiet sensitivity. And a love to draw... I would watch them and see my son. Emma would point at my son's pictures and say "That's my Daddy" and I would say "That's right, that's your Daddy". Elizabeth would sit quietly and draw. One day Elizabeth drew something and went into my son's old bedroom, when I went in there to see what it was, I saw laying on his dresser was a drawing of a little girl with golden hair and written on the drawing were the words... "Daddy I Love You".

History says that my Son was a Hero because he died saving lives... I say that my Son was a Hero... because he LIVED to save lives.

My answer to the reporter as to why I do this admittedly painful tour was this... that if talking about my son can in some way make others want to be like him, and if more and more people live his life, than maybe... just maybe, we can be a better World and stop killing each other, and have for an enemy a common enemy of sickness and disease, and not each other, as no other Father has to look for his son... in the shadows.

As for time being a healer, I explained to this reporter that time is a relentless enemy, that I miss my Son more, every second, of every hour, of every day... That I don't need the anniversary of 9/11 to feel the pain. I see 9/11 every day and will do so till the day I die. I also feel that if feeling less pain means to have less memory of my Son, I say this bring the pain on and times it by infinity, because it is no price at all to pay for the Son that I have.

And that one thing that I was going to ask you, and those who Honor John, is this. When you speak of Lieutenant John P. Napolitano, do not dwell so much on his Courage that day in September, or the tragic way that he died, but rather, remember always... the Heroic way that he Lived.

Sincerely,
John Napolitano, Father of Lt. John P. Napolitano, F.D.N.Y. Rescue 2

Part 7

A Hero, A Tragedy, and A Father's Love

Seventh and final article in a series of articles reflecting on the events of 9/11/01 and the five years that have elapsed since, through the

words of one victim's father

By John V. Napolitano, Sr.

September 12, 2006

Dear Bill,

Yesterday, a Nation mourned once again, the Fifth Anniversary of the attacks on September 11, 2001. For some it was a re-opening of old wounds. For others it was the pain of wounds that never heal. This year my oldest daughter Dawn was going to be with me when I went down to Ground Zero with her "Uncle Lenny". Lenny has been an uncle to Dawn since the day that she was born in Brooklyn, New York, May 25th, 1970, three months after I was Honorably Discharged from the Army, and almost down to the wire when my Army health insurance would have run out, and her Mother and I would have faced some serious bills. But that would be Dawn, just the beginning of keeping us "on our toes". May 25th was also the birthday of Lenny's younger brother, John.

Dawn Ann Napolitano, or "Dawnie" as Lenny always called her, was two years younger than her brother John, and no two siblings could be more different... John quiet... Dawn loud... John low keyed... Dawn flamboyant... John ask him once... Dawn keep on asking... John homework yes... Dawn what homework? Well you get the picture. Once my neighbor laughingly shared a story with me, she told me that when the school bus dropped the kids off after school, that there was some teasing and pushing that looked like it was going to get out of hand, she went on to say that "Your Son, Johnny, was trying to be the peacemaker, but Dawn threw her books down on the ground, and said to the kids that were being unruly, "Let's Go". Dawn and John... brother and sister... opposites... where John would say "let's think about this" Dawn would say "let's see what happens". Although different in many ways... no brother and sister were ever closer, the bond that they had for each other could never be broken. Not even by a skyscraper. Today Dawn, the "tough" one was going to "Ground Zero". Today we will see how "tough" Dawn is.

Dawn is also bringing her special son and special daughter. Some call it stepson, or stepdaughter, but Dawn doesn't like that word. And neither do I. She loves them as a mother, and they love her right back. At home my wife is babysitting Dawn's four year old son, named John, after his Uncle John. We know that John Grosso will keep his grandmother on her toes because he inherited a great deal of his mother's genes. But we need for my wife to stay busy this day, and hope that "baby John" lives up to all of our expectations. I think of my grandson, and also look at my grandchildren Danielle and Christopher and my daughter as we leave, and I think to myself "what a good mother Dawn turned out to be".

We pick up Lenny and head into "the City". There is a lot of traffic in Manhattan, I find a parking space several blocks away from the World Trade Center, but made good time and will not be late for the Ceremony. I am nervous. We walk to "Ground Zero", and Lenny is telling Dawn about where we entered the Trade Center that first day, and the days after. The more we walk, and the closer we get, the more solemn everybody seems to be. The streets are congested, as Manhattan streets get. Dawn walks faster and is slowly getting ahead of us, I walk quicker to keep up, Lenny, Christopher, and Danielle following closely. But Dawn is looking straight ahead, picking up her pace, she hears in the distance the bagpipes playing, she is getting closer, and almost running to what is not there... running to her brother.

I show my ID to those in charge of security, and we are let into the viewing area. It is crowded, it seems more crowded than last year, the names of those that were lost that day in September are being said over loudspeakers, and with each name a heart breaks, and the sound of crying is all around you.

I hold my Son's photo, sometimes near me, sometimes in the air. Others are doing the same with their loved ones, I see familiar faces, but this year I notice a difference. The faces are getting older. But the smiling faces of Angels held high are still the same.

We walk with the crowd towards the ramp that will descend to where the towers were. The first bell rings... the north tower is hit. Lives are lost. Husbands and wives, mothers and fathers, sons and daughters, sisters and brothers are gone forever. Everybody stops moving and are silent... except for the sobs.

The names of the lost are said again. The procession down the ramp continues. Volunteers are giving out water or snacks. It reminds me of those days in September. People giving out nourishment to those who searched, and sometimes giving a shoulder to lean on. Everybody that is in the "Basin", or what was sometimes called the "Pit" of the Trade Center, are looking at the photos held tightly, the faces of each others loved ones, sharing each others pain. Civilians, Police Officers, Firefighters, Servicemen. Strangers hugging strangers. The Bell rings again, the south tower is hit, and people are dead. Everyone is silent, except for the crying. The names are said again. We stand by the south tower, waiting to hear, Glen Flett, Peter Brennan, William Mahoney, and Lenny's brother, John Crisci. I hear Dawn sniffing. Her eyes are red, Christopher and Danielle their heads bowed. Lenny and I look at each other, and we remember.

We hear the name John Crisci, and soon after, the bell rings... the south tower has collapsed. People are dead. Lenny, tears streaming down his face, looks up at the sky, and salutes his brother.

Dawn is crying.

We walk with the crowd towards the north tower, I look at all the faces. My 9/11 family. I look at the children, and I am suddenly aware of another thing that is different. The children are older. Babies are toddlers, toddlers are youngsters, youngsters are teenagers, and the teenagers, they may be the young men and woman that I see in uniform. Children of the victims and of the Heroes of that day in September. Children of our fallen firefighters and police officers, America's first Patriots (of the 21st century). They have picked up their mother's or father's banner and are now the Defenders of Freedom... for us and for others. A group of Marines pass by me and as they do, I thank them for their service, and I shake each and every one of their hands. So much the same, this five year Anniversary, and yet so much different. Dawn looks at everything around her. A mother wearing a photo of her child is crying. She goes to her knees and with her hand scoops up some dirt, but to her I know that this is more than dirt, this is sacred. It is her child that she is trying to hold. Dawn is crying.

The bell rings. The north tower has collapsed. I see a baby behind a glass partition, he is asleep so peaceful. My father is at my side, he is smiling. I am a Dad. I am so happy. I can't wait to play with him, to take him to the park... to the zoo. I know already that I am going to get him a dog. I can't believe it. I am a Father. The adventure begins.

I see an infant that never seemed to cry, he was awake when he was supposed to be awake, slept when he was supposed to be asleep. This being a Father, was so easy. I remember the toddler who would always smile at me as I held him in my arms, he would pull on my nose and ears, and I would

bury my face in his stomach and he would laugh. The little boy who on Christmas morning, would patiently wait until his younger sisters opened their gifts, before he opened his, and would try to not get in their way as they scurried all about looking to see what was theirs. I see a teenager who one day came home with firefighter's gear. A teenager who would devote his free time as a volunteer firefighter. A teenager who decided that he wanted to help people.

I close my eyes and see a young man marry his high school sweetheart, I see him join the fire department of the City of New York, still volunteering with the Lakeland Fire Department. I see the young man become a Dad. I see my Hero.

I see a fire truck come to a stop at a horrific scene, from above is great danger, steel and concrete and glass is falling. And so are people. Seven members of an Elite Rescue Unit exit their rig, secure whatever tools they are going to need, go into the horror, walking into where so many are trying to flee. People are in trouble. People need to be saved. There are many brave heroes this day. Of the seven from Rescue 2, one of them is my son. I know that all these heroes did what my son did. They used all of their skill, and all of their courage, to save lives. And I also know that they thought what my son thought. He thought of his wife, and his children, he thought of his sisters, and he thought of his mother. And he thought of me.

The bell rings. Lives are lost. My son is dead. And then a name... John P. Napolitano. I become aware of someone crying loudly. It is my daughter, Dawn. She is standing straight, her arms at her side, her eyes closed. And she is crying. I stood close but left her alone most of the day, so that she could reflect on what she saw, to leave her with her thoughts... she now saw her brother die... I put my arm around her, and hold her as she grieves for her brother. "Tough guys" do cry.

I go to a pool of water where the north tower once stood, it is filled with flowers and photographs, of our Loved Ones. On a bed of flowers I put my son's picture. The names are being said. I speak to my son, and in a while it is time to go, Dawn, Lenny, Danielle, Christopher, and I head for the ramp that will lead us out of the "Pit". Back home, my wife is watching everything on television, the camera zooms in on a photograph in the pool of roses, and the newsmen says the name, "Lieutenant John P. Napolitano". And a Mother cries.

We walk slowly up the ramp, we are all very much tired, and emotionally spent. This fifth year Anniversary, had a few differences, but one thing kept nagging at me, I kept looking for the firefighter that had my son's picture in his hat. Every year I would meet him and his wife, we would cry, we would hug. One year when he was looking for me, I said that my son would show the way. But this year we didn't meet... "well last year wasn't as crowded", and "nothing could have happened", I thought. But still I was a little disappointed.

Dawn was misty eyed as we slowly walked up the ramp, looking at the pictures being held high by those still going down. I held another picture of my son close to me as I walked on. Dawn will remember this day for the rest of her life, I looked at Danielle and Christopher, and I know that today they got a little older. Lenny and I would look at each other every now and then, and no words had to be said, we would just shake our heads. I think about all the indecision of what kind of Memorial should be placed here. What would be a fitting tribute to all who were lost that day in September. What will make a statement. And an idea came to me, the answer was so simple, and it stared at everyone right in the face. LEAVE IT ALONE. Simply leave it alone. A big hole in the ground. A hole that could never be filled. Surround it with the faces, of all who were lost, leave the ramp so that all can come to visit, and look upon the faces. And have them look back at us, I turned to look back at the "Pit", to see the big hole surrounded by faces, and as I was looking down, I heard "Mr Nap", "Mr Nap". I turned, and on the other side of the rope going down the ramp was my son's friend, the tall firefighter, and his wife. Tears streaming down their faces, and soon down mine.

"We looked all over for you", he said as he hugged me, he almost lifted me over the rope that separated us, his wife loosened it so that I could step through, we held each other for a long time, he was crying, I hugged his wife, she was crying, then back to hugging him. The Honor Guard of Police Officers and Firefighters, that stood near us were wiping tears from their eyes. We spoke for a while, I hugged his wife and then him one last time, and I gave to him the photo of my son that I was carrying, and I said, "here, you're in charge of this". As the firefighter and his wife walked down the ramp, I walked up, and even though I was crying, I smiled... I know that my Son answered me.

Signature

John Napolitano, Father of,
LT John P. Napolitano FDNY Rescue 2

Editor's note: I want to thank John Napolitano, Sr. for sharing his thoughts with us these last couple weeks with letters written especially for this series. And for letting me publish the letters that he has written to me the last couple years, and the letters he has written to his son since 9/11/01. John writes his son each year on his birthday (the 4th of July), at Christmas, on Father's Day, Thanksgiving, and sometimes in between. The letters can be found on a website called Legacy.com, and you can view them by clicking on the link to World Trade Center, and entering John's name. If you view the John Napolitano guestbook, you'll find page after page of memorials, words written by John Jr.'s family and friends, and by complete strangers. Strangers that have been moved to write a few words of remembrance, some to comfort his family, some to respond to other tributes, some that are written just because the viewer couldn't read all they've read without adding their own thoughts.

I think back to the day I first learned about John, at the IAFF memorial for fallen firefighters in Colorado Springs. I remember how it took 19 minutes to recite the names of the fallen New York firefighters, and it gives me the chills just to think of it. I can't help but respect and appreciate those who work as firefighters and police officers, putting their lives on the line on a daily basis. And it fills me with pride to think of my brother Jay, a paramedic in Illinois, and my brother-in-law Bob, a volunteer firefighter in Sierra Madre for more than 20 years. I'm proud that John Napolitano, Sr. who is, in my mind, a hero for having raised a son to be the man that John Napolitano, Jr. was, thinks of me as a friend. It is amazing to me to think that because I went to Colorado Springs in 2002 and decided to put my remembrances of that memorial on my website, and because John Sr. Googled his son's name a couple years later, I now have a "pen pal" relationship with this very special man. To John, his wife and daughters, and to John Jr.'s wife Ann and their daughters Emma and Elizabeth, I wish you the best, and hope that with time, comes peace. And I want you to know that 3,000 miles away, there is someone who was profoundly moved and affected by hearing the story of your son, brother, husband and father. Rest assured, I will never forget.



Capt. Charles F. "Chic" Burlingame, III, USNR (ret.)



Lt. Chic Burlingame, VF-103, USS Saratoga









